University of Alberta

Expressions of Racial Hatred and Criminal Law: the Canadian Response

by

Sanjeev Singh Anand

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirement for the degree of Master of Laws.

Faculty of Law

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Preface

I was eleven years old when the *Charter* came into force. I remember my school teachers giving us copies of the *Charter*, accompanied by explanations of it. I recall being told that the *Charter* guaranteed certain basic rights to Canadian citizens. My teachers spoke of how governments had in the past unduly infringed the rights of Canadians and how the *Charter* was going to prevent such actions in the future.

Consequently, I grew up thinking that the *Charter* was a shield protecting my family from racists who wanted to discriminate against us in matters like housing and employment and who advocated our removal from our own country. What I did not understand until I entered law school was that the *Charter* constrains government action - it does not address private discrimination. It was at law school that I began to realize that the *Charter* could be used to attack legislation that addressed important concerns for me. The *Keegstra* case was the most poignant example of this, for it was in this case that the *Charter* was used to attack legislation which had been enacted to protect minority groups.

Like so many things in our world, my concept of the *Charter* went from an idyllic black and white to shades of grey. I recognized that the *Charter* contains important guarantees within it - guarantees I am thankful for, like the freedom of expression contained within s.2(b). Yet it is this same guarantee that conflicts with the hate propaganda sections of the *Criminal Code* that aim to protect the equality rights

of racial, ethnic and religious minorities. It was this conflict and the controversy surrounding it that first drew me to the topic of hate propaganda.

However, I had not resolved to write about this topic until I was with my wife and her grandmother at her grandmother's apartment in Calgary. We were channel-surfing when we happened to come upon a documentary about the far right in Canada. As part of this documentary the camera crew filmed a Heritage Front demonstration on Parliament Hill. The demonstration was comprised of numerous speeches against women, gays and lesbians, and racial, ethnic and religious minorities. The expression at the demonstration fit the description of extreme hate propaganda. Surprisingly, it was not the expression that caught my attention as much as the government toleration of it. Police officers surrounded the members of the Heritage Front, protecting them from an anti-racism group that was also present. Moreover, none of the speechmakers were charged under the hate propaganda sections of the *Criminal Code*.

It was this latter point that caused me to research the caselaw under the hate propaganda sections of the *Criminal Code*. I discovered a real paucity of caselaw. On numerous occasions the media reported incidents of hate propaganda dissemination by various groups and yet the criminal law was not enforced. Consequently, I decided to write a thesis that not only grappled with the conflict between freedom of expression and freedom from hate, but that also addressed why Canada's criminal laws concerning hate propaganda were not being enforced. It was my goal to suggest reforms that

would facilitate their enforcement while ensuring that the freedom of expression was not unduly impacted.

Finally, I would like to articulate how the writing of this thesis has affected me from an academic perspective. When I entered the Masters' program I thought that writing a thesis was akin to writing a lengthy paper. What I soon discovered is that a thesis not only involves the act of writing but, perhaps more importantly, the act of re-writing. It was through my revisions that I learned the most. When the revision process commenced I was defensive and impatient, having never really received a great deal of constructive criticism of my written work. As the process continued I became more receptive to this criticism, and I would like to thank Professor Ross for the patience she showed as I went through this difficult time. In many respects, the writing of a thesis is a collaborative effort between the student and the supervisor, and without her assistance the thesis that is before you would never have been written.

Abstract

This thesis argues that the criminal proscription of hate propaganda in Canada is justifiable from a constitutional perspective. It also asserts that criminal law has a special and necessary role to play in combatting hate propaganda. By and large, the criminal offences pertaining to hate propaganda are well drafted, in that they catch the most serious types of hate propaganda while giving great deference to freedom of expression. However, there have been very few prosecutions under the criminal provisions concerning hate propaganda, despite the fact that numerous human rights cases demonstrate that the dissemination of hate propaganda is an ongoing problem in Canadian society. Therefore it seems that Canada's criminal laws dealing with hate propaganda do not give sufficient protection to equality rights. Consequently, these laws are examined in order to suggest reforms that would facilitate their enforcement while ensuring that the freedom of expression is not unduly impacted.

Acknowledgements

I would like to thank Professor June Ross for assisting me in my endeavours to produce a thesis of which I can be proud. Her suggestions and insights were invaluable during the writing process. I am also grateful to Professor Dick Dunlop for his comments on many drafts of the "work-in-progress." For the professors and fellow students who taught me so much during the past year and a half, and for the University of Alberta's financial assistance, I am additionally thankful.

Without the emotional support of my family, this thesis would never have been written. In my moments of greatest doubt, I drew strength from their encouragement. Finally, I'd like to thank my wife, Nicholette, who was a tireless proofreader, therapist, and all around good egg. Watching her succeed in academic pursuits inspired me to explore the bounds of my own possibilities.

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INTRODUCTION

Since freedom of expression and equality are necessary to the development and preservation of democracies, it comes as no surprise that Canada has a traditional and ongoing commitment to both of these fundamental rights. Nevertheless, these rights sometimes come into conflict in Canadian society.

Canada's hate propaganda laws provide an example of such a conflict. As Canadian courts have come to recognize, these laws, in their attempt to provide support and protection to the equality rights of racial, religious and ethnic minorities by proscribing hate propaganda, infringe the free expression rights of those who engage in hateful invective. However, a close examination of Canada's criminal hate propaganda provisions reveals that they are drafted so as to attempt to balance freedom of expression and equality concerns.

In this thesis I argue that the criminal proscription of hate propaganda is justifiable from a constitutional perspective. I also assert that criminal law has a special and necessary role to play in combatting hate propaganda. I come to the conclusion that, by and large, the criminal offences pertaining to hate propaganda are well drafted, in that they catch the most serious types of hate propaganda while giving great deference to freedom of expression. However, the proper balance between the protection of equality rights and the protection of freedom of expression has not yet been achieved by this legislation. Evidence of this imbalance is provided by the fact

that there have been very few prosecutions under the criminal provisions concerning hate propaganda, despite the fact that numerous human rights cases demonstrate that the dissemination of hate propaganda is an ongoing problem in Canadian society. Therefore it seems that Canada's criminal laws dealing with hate propaganda do not give sufficient protection to equality rights. As a result, I examine these laws in order to suggest reforms that would facilitate their enforcement while ensuring that the freedom of expression is not unduly infringed.

Why has freedom of expression been, and why does it continue to be, considered a fundamental value in Canadian society? Three of the most important rationales for the protection of freedom of expression are its role in advancing democratic principles, truth and personal fulfillment.[1]

A democracy cannot flourish without the free exchange of ideas. Citizens of a democracy must be able to express their opinions about the functioning of public institutions. The prominent role of debates in election campaigns and Parliamentary proceedings illustrates that freedom of expression is a necessary characteristic of a democratic society. Canadian judges have also traditionally treated free expression as an essential prerequisite to intelligent self-government in a democratic system.[2]

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[1] These three rationales for the protection of freedom of expression were chosen by the Supreme Court of Canada in *Irwin Toy Ltd.* v. *Quebec (A.G.)* (1989), 58 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Irwin Toy*] to be the values underlying the constitutional guarantee of freedom of expression.

[2] One of the earliest Canadian cases demonstrating this judicial perspective is *Re Alta. Statutes* [1938] S.C.R. 100 (S.C.C.) [hereinafter *Alberta Press*]. In this case, Duff C.J. held that "it was axiomatic that the practice of . . . [the] . . . right of free public

McIntyre J., in commenting on the deep roots of freedom of expression in Canada, and the vital role it has played in Canadian democracy, stated:

> It [freedom of expression] is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.[3]

Another rationale for attaching great importance to freedom of expression is that it is essential in order to obtain the truth. A proponent of this rationale for protecting freedom of expression was John Stuart Mill. Mill thought that silencing opinions would be detrimental to society because, if the silenced opinion is correct, society is "deprived of the opportunity of exchanging error for truth: if wrong, they [society] lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[4]

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discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions." (*Alberta Press*, *supra* note 2 at 133.) This view of free expression was accepted and reiterated by Rand, Kellock and Locke JJ. in *Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299 (S.C.C.) and Rand, Kellock and Abbott JJ. in *Switzman* v. *Elbling* [1957] S.C.R. 285 (S.C.C.). For a more recent example demonstrating the judiciary's acceptance of free expression as an essential pre-requisite to intelligent self-government in a democratic system, see the comments of Cory J. in *R.* v. *Kopyto* (1987), 47 D.L.R. (4th) 213 at 226 (Ont. C.A.).

[3] *R.W.D.S.U., Local 580* v. *Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 at 183 (S.C.C.).

[4] J.S. Mill, "On Liberty" in D. Spitz, ed., *On Liberty: A Norton Critical Edition* (New York: W.W. Norton & Company Inc., 1975) 3 at 18.

This idea was further developed by the famous American jurist, Oliver Wendell Holmes, in his dissenting opinion in *Abrams* v. *United States*.[5] Holmes argued that free expression must be protected so that a marketplace of ideas is created. The truth was theorized to be found in the market's free trade of ideas because, in the competition of the marketplace, true ideas would overcome false ones. As the truth is sought not just in politics but also in other disciplines, such as the natural and social sciences, medicine and history, the marketplace of ideas theory extends protection to the expression of more than just political speech.

Many scholars base their defence of freedom of expression on the idea that freedom of expression promotes personal fulfillment.[6] One such scholar is Thomas Emerson. Emerson argues that the development of an individual's personality and the achievement of that individual's self-realization depends on that person forming and communicating his or her thoughts, beliefs and opinions to others.[7] This rationale for protecting freedom of expression would widen the ambit of protected expression to include not just speech but also many kinds of art, music and dance. The role of

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[5] *Abrams* v. *United States* (1919) 250 U.S. 616 at 630.

[6] See, for example, R. Dworkin, *Taking Rights Seriously*, 1st ed. (London: Duckworth, 1977), M. Redish, *Freedom of Expression: A Critical Analysis*, 1st ed. (Charlottesville, Va., 1984), C.E. Baker, "Scope of the First Amendment Freedom of Speech" 25 U.C.L.A.L.Rev. 964 (1978), M. Redish, "The Value of Free Speech" 130 U.Pa.L.Rev. 591 (1982), and D.A.J. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" 123 U.Pa.L.Rev. 45 (1974).

[7] T. Emerson, "Toward a General Theory of the First Amendment" (1963) 72 Yale L.J. 877 at 877 and 879.

freedom of expression in advancing democratic principles, truth and personal fulfillment demonstrates that an individual's freedom of expression should not be readily infringed.

However, freedom of expression has not been regarded as an absolute right in the past, nor is it regarded as such in the present,[8] because certain types of expression threaten important community interests. When a type of expression is such a threat, and is only tenuously linked to the advancement of democratic principles, truth or personal fulfillment, a strong argument arises that it should be curtailed. This thesis will demonstrate that hate propaganda falls into this category of expression.

Those who support legislation against hate propaganda assert that the dissemination of hate propaganda serves to reinforce racist attitudes in society and causes severe harm to targets of the propaganda. Hatemongering poisons the atmosphere of public life so that members of target groups are reluctant or unable to emerge from the negative identification caused by hate propaganda in order to participate in the larger social and political arena.[9] In addition, hate propaganda discredits target group members, reducing their ability to have their own speech taken seriously.[10] Describing the impact unchecked hate speech has on target group members, Matsuda states as follows:

To be hated, despised and alone is the ultimate fear of all human beings.

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[8] The Special Committee on Hate Propaganda, *Report* (Ottawa: Queen's Printer, 1966) (Chair: M. Cohen) at 6-9 contains an excellent recount of the history of the scope of freedom of expression in Western society.

[9] M.G. Somers, *Hate Propaganda and Freedom of Expression in a Multicultural Society* (LL.M. Thesis, York University, 1993) at 15 [unpublished].

[10] C. MacKinnon, "Not a Moral Issue" (1984) Yale L. & Poly. Rev. 321 at 321.

> However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When . . . the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person . . . The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred. One can dismiss the hate groups as an organization of marginal people, but the state is the official embodiment of the society we live in.[11]

In Canada, the debate about whether governments should legislate against hate propaganda has largely given way to the debate as to what manner and scope of legislation should be used.[12] Since it is beyond the scope of this thesis to examine all hate propaganda legislation, this thesis is confined to the proscription of hate propaganda by Canadian criminal law. While misogyny and homophobia give rise to hate propaganda that may require criminal prohibition, they require a separate analysis because the nature of gender subordination is complex and because sex operates as a locus of oppression.[13] Consequently, these topics fall outside the focus of this thesis.

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[11] M.J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in M.J. Matsuda, C.R. Lawrence, R. Delgado & K.W. Crenshaw, eds., *Words That Wound* (Boulder, Colorado: Westview Press, Inc., 1993) 17 at 25.

[12] D. Schneiderman, "Racist Incitement: Freedom of Expression and the Promotion of Hatred" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Calgary: Thomson Professional Publishing Canada, 1991) 209 at 209. In the Supreme Court of Canada there is unanimous support for the proposition that governments can and should legislate against hate propaganda. The issue that divided the court is whether criminal law is the appropriate manner of legislation to be used as opposed to human rights legislation and whether the criminal legislation being examined, which proscribed hate propaganda, was overbroad in its scope. See *R.* v. *Keegstra* (1990), 1 C.R. (4th) 129 (S.C.C.).

[13] M.J. Matsuda, *supra* note 11 at 23.

This thesis specifically addresses the type of hate propaganda related to expressions of racial hatred.[14]

Chapter One retraces the events that led to the demand for criminal legislation against hate propaganda in Canada. It then summarizes the findings of the Parliamentary Report that recommended the amendments which today form the hate propaganda sections of the *Criminal Code*.[15] The Report's scope was limited to an examination of hate propaganda in Canada, and I argue not only that this scope was too narrow, but that its limitations led to the Report's erroneous conclusion that racial hatred in Canada was limited to extremist groups marginal to Canadian society. I examine the evidence of discrimination in Canadian society from government sanctioned discrimination, which forms a part of our history, to modern evidence that shows the attitudes underlying this have not changed. This expanded scope of inquiry emphasizes that there is a real need for the legislative proscription of hate propaganda.

Chapter Two examines the constitutionality of the *Code* offence of wilfully promoting hatred, as considered in the leading case of *R.* v. *Keegstra*.[16] I assert that the Supreme Court's ruling in *Keegstra* was correct in so far as hate propaganda was given some constitutional protection under the rubric of freedom of expression. The Court's approach in *Keegstra* best ensures the protection of free expression without

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[14] For the purposes of this thesis the term "racial hatred" encompasses religious and ethnic hatred.
[15] *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Code*].
[16] *R.* v. *Keegstra* (1990), 1 C.R. (4th) 129 (S.C.C.) [hereinafter *Keegstra*].

harming or compromising the government's ability to enact and enforce legitimate proscriptions of harmful expression. Dickson C.J.C.'s majority judgment in *Keegstra*, which upheld the constitutionality of the offence of wilfully promoting hatred as a reasonable limit to freedom of expression, is preferable to McLachlin J.'s minority judgment which found the offence to be unconstitutional. In coming to this conclusion, I argue that criminal law is a proportionate and appropriate response to hate propaganda. The strongest argument relied upon to support this position is based on the educative effect of criminal law. In addition, other constitutional issues raised in *Keegstra* are briefly discussed and, finally, litigation under the offence of wilfully promoting hatred since *Keegstra* is examined.

Chapter Three analyzes the *Code* offences of advocating genocide, public incitement of hatred, and spreading false news in order to assess their constitutionality. I point out that the offence of advocating genocide may have problems passing constitutional muster in that, as it is currently worded, the offence catches more than just the public advocacy of genocide. It is also declared that the offence of the public incitement of hatred would probably be found to be constitutionally valid. In analyzing this offence's constitutionality, I dispose of numerous arguments suggesting that the offence's current wording renders it a greater-than-minimal impairment of the freedom of expression. The history and early jurisprudence relating to the offence of spreading false news are then examined, and the Supreme Court of Canada's decision in *R.* v.

Zundel[17] is critiqued. I conclude that the Court was correct to determine, in *Zundel*, that the offence of spreading false news is unconstitutional. I assert that, contrary to what some people believe, the Supreme Court's commitment to the protection of minorities is strengthened rather than weakened by the *Zundel* decision.

Chapter Four explores why criminal law is not being used to combat hate propaganda and what reforms should be implemented to remedy this situation. These reforms are analyzed based on the reasoning of the Supreme Court in the *Keegstra* and *Zundel* cases. Moreover, they aim to ensure not only that more criminal prosecutions for expressions of racial hatred are commenced but that the hate propaganda sections of the *Code* curtail only a very limited type of expression. Finally, this thesis presents draft legislation which incorporates the recommended reforms in the hope of achieving the balance between freedom of expression and racial equality essential to a democratic and multicultural Canada.

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[17] *R.* v. *Zundel* (1992), 16 C.R. (4th) 1 (S.C.C.) [hereinafter *Zundel*].

CHAPTER ONE

RACISM IN CANADA

I. INTRODUCTION

The twentieth century has seen much debate over racism and hate propaganda in Canada. In 1965 the federal government appointed a special committee, the Cohen Committee, to study and report upon the problems related to the dissemination of hate propaganda in Canada. The Committee found little evidence of mainstream racism, but historical analysis and more recent studies paint a grimmer portrait of the state of racism in Canadian society.

Before the topic of racism in Canada can be explored, certain phrases need to be defined. Throughout this thesis I refer to the terms "racism," "racial prejudice," "racial discrimination," "expressions of racial hatred," and "hate propaganda." Banton provides a basic definition of racism:

> [R]acism is the doctrine that a man's behaviour is determined by stable inherited characteristics deriving from separate racial stocks, having distinctive attributes and usually considered to stand to one another in relations of superiority and inferiority.[18]

Racism is the belief that one race is superior to another, and this belief is associated with attitudes and acts toward the "inferior" race(s).[19] The attitudes associated with

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[18] M. Banton, "The Concept of Racism" in S. Zubaida, ed., *Race and Racialism* (London: Tavistock Publications, 1970) 18 at 19.

[19] H. Nelson & R. Jurmain, *Introduction to Physical Anthropology*, 4th ed. (St. Paul, MN: West Publishing Company, 1988) at 203.

racism comprise "racial prejudice." More specifically, racial prejudice refers to attitudes, normally of a pejorative nature, towards individuals or groups, many of these attitudes being formed independent of and unresponsive to actual contact and experience with the targeted individuals and groups.[20] "Racial discrimination" involves concrete acts whereby differential treatment is meted out according to perceived racial differences or differential effects are caused by facially equal treatment.[21] These definitions beg the question, "What is a race?" As it is popularly used, the term "race" is more a sociocultural concept than a biological one.[22] Groups of people are often designated as a race regardless of their genetic characteristics. For example, ethnic groups (Germans, French, Chinese, etc.) and religious groups (Muslims, Buddhists, Jews, etc.) are often designated as races.[23] In this thesis, the phrase "expressions of racial hatred" is used synonymously with the term "hate propaganda," as both refer to the dissemination of a malevolent doctrine of vilification and detestation of a group of individuals based on racial, religious or ethnic identification.

It is not uncommon for Canadians to believe that their nation is largely free of racism, that Canada is living proof that different races can live harmoniously within the framework of a single state, and that Canada is an example to be held up to the rest of

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[20] J. Peoples & G. Bailey, *Humanity: An Introduction to Cultural Anthropology*, 1st ed. (St. Paul, MN: West Publishing Company, 1988) at 40-42.
[21] M.G. Somers, *supra* note 9 at 5 and *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 143 at 172-174 (S.C.C.).
[22] H. Nelson & R. Jurmain, *supra* note 19 at 194.
[23] *Ibid.*

the world because of these characteristics. As proof of the tolerance of Canadian society, people point to Canada's policy of multiculturalism. Adopted by the government in 1971, this policy has four goals:

> First, resources permitting, the government will seek to assist all Canadian cultural groups that have demonstrated a desire and effort to continue to develop a capacity to grow and contribute to Canada, and a clear need for assistance . . . Second, the government will assist members of all cultural groups to overcome cultural barriers to full participation in Canadian society. Third, the government will promote creative encounters and interchange among all Canadian cultural groups in the interest of national unity. Fourth, the government will continue to assist immigrants to acquire at least one of Canada's official languages in order to become full participants in Canadian society.[24]

In essence, multiculturalism's aim is to make Canada a pluralistic mosaic. It eschews the process of assimilation and instead embraces the integration of all groups into the Canadian community, so as to ensure that those who wish to maintain their distinctive cultural identities may do so.

With the adoption of the *Canadian Charter of Rights and Freedoms*[25] in 1982, the policy of multiculturalism gained constitutional status. Section 27 of the *Charter* states: "This Charter shall be interpreted in a manner consistent with the preservation

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[24]Pierre Elliot Trudeau, House of Commons, *Debates*, 6 Oct. 1971, 8545-8548. This articulation of the policy of multiculturalism given by the Prime Minister in the House of Commons and the later enactment of the *Canadian Multiculturalism Act*, S.C. 1988, c.31 was the government's official response to the recommendations contained in Canada, Report of the Royal Commission on Bilingualism and Biculturalism, Book IV, *The Contributions of the Other Ethnic Groups* (Ottawa: Queen's Printer, 1969).

[25] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 [hereinafter *Charter*].

and enhancement of the multicultural heritage of Canadians." Ostensibly, the policy of muticulturalism is accorded great importance in Canadian society today.

Prior to 1971 and the adoption of the policy of multiculturalism, the government took other steps to protect minority groups. One such step was the amendment of the *Code* so as to proscribe the spreading of hate propaganda. The remainder of this chapter examines the process which led to the enactment of the hate propaganda sections of the *Code*. As well, the presumption that Canada is a nation nearly free of racism is examined through an historical analysis of the treatment of visible minority groups in Canada. Finally, new developments and studies pertaining to the state of racism in modern Canada are assessed.

II. THE DEMAND FOR CRIMINAL LEGISLATION

Organized hate group activity has a long history in Canada. In the early 1920s and 1930s, many racist and anti-Semitic fascist organizations took root throughout the nation. These groups struck a popular chord by blaming minority groups and democracy for the economic stagnation of the depression.[26]

This upsurge in racist sentiment was quickly quelled by Canada's entry into the Second World War and the resulting revelation of the Holocaust. The disclosure of the systematic genocide of the Jewish people by the Nazis during the Second World War motivated a delegation of the Canadian Jewish Congress to appear before a 1953 joint

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[26] K. Dubick, "Freedom to Hate: Do the *Criminal Code* Proscriptions Against Hate Propaganda Infringe the *Charter*?" (1990) 54 Sask. L. Rev. 149 at 152-153.

committee of the House of Commons and the Senate, that was dealing with revisions to the *Code*.[27] Despite the vigorous attempts of the Canadian Jewish Congress to lobby the government for legislation proscribing religious and racial hate propaganda, nothing was done.

It was not until 1963, following an overt revival of Nazism in Canada, that strong lobbying for an anti-hate law began in earnest.[28] An N.D.P. member of Parliament in the 1964 House of Commons, Mr. David Orlikow, asked the Minister of Justice, Guy Favreau,

> Has the Minister given consideration to the hate literature which is now being distributed in various cities? Does the government consider that there is at the present time legislation which will prohibit this kind of literature being distributed through the mails . . .?[29]

The Minister responded,

> . . . the possibility of amending the *Criminal Code* was referred to the criminal law section of the conference of uniformity of legislation in Canada in 1962. It reported that while the objective sought to be attained was eminently desirable, no recommendation was made because no formula devised would deal adequately with the problem without affecting the general freedom of expression of opinion in an adverse way.[30]

Despite these comments by the Minister of Justice, he eventually did yield to increasing pressure and, in January of 1965, he announced the appointment of a special

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[27] S.S. Cohen, "Hate Propaganda - The Amendments to the *Criminal Code*" (1970) 17 McGill L.J. 740 at 767.
[28] *Ibid.* at 768. The 1960's revival of Nazism and Nazi-like propaganda in Canada is recounted in great detail in Special Committee on Hate Propaganda, *Report* (Ottawa: Queen's Printer, 1966) (Chair: M. Cohen) at 11-25.
[29] *House of Commons Debates* (Vol. I, 1964) at 132.
[30] *Ibid.* at 133.

committee, whose chairman was Dean Maxwell Cohen of McGill University's Faculty of Law. The Cohen Committee's mandate was to study the problems associated with the spread of hate propaganda in Canada.

III. THE COHEN REPORT

The Cohen Committee released its unanimous report in November of 1965. In the introduction, the Committee examined the appropriate scope of free speech in Canada. While acknowledging that the individual's freedom of expression was a cornerstone of the Canadian way of life, the Committee also stressed that individual rights cannot be supported in absolute terms, especially when those rights threaten vital community interests.[31]

The Committee also doubted that man's rationality would always allow him to distinguish truth from falsity. The Committee cited the successes of modern advertising, the persuasiveness and invasiveness of modern media, and the success of Nazi propaganda in pre-World War Two Germany as the empirical bases of its skepticism.[32]

Next, the Committee examined the extent of the hate propaganda problem in Canada. It defined "hate propaganda" as material whose "main characteristics . . . are a generally irrational and malicious abuse of certain identifiable minority groups in

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[31] Special Committee on Hate Propaganda, *Report* (Ottawa: Queen's Printer, 1966) (Chair: M. Cohen) at 6-7 [hereinafter Cohen Report].
[32] *Ibid.* at 8.

Canada."[33] The Committee then proceeded to determine whether the spread of hate propaganda constituted a threat so substantial to Canadian society that it warranted legislative action.

It found that none of the existing racist organizations represented an effective political or propaganda force. Indeed, the Cohen Committee ascertained that racial hatred was limited to marginal extremist groups. Nevertheless, it concluded that the potential danger presented by the activities of such organizations warranted some degree of legislative intervention. The Committee concluded that:

> However small the actors may be in number, the individuals and groups promoting hate in Canada constitute 'a clear and present danger' to the functioning of a democratic society. For in times of social stress such "hate" could mushroom into a real and monstrous threat to our way of life . . .
>
> In the Committee's view the "hate" situation in Canada, although not alarming, clearly is serious enough to require action. It is far better for Canadians to come to grips with this problem now, before it attains unmanageable proportions, rather than deal with it at some future date in an atmosphere of urgency, of fear and perhaps even of crisis.[34]

After determining the social-psychological effects of hate propaganda, the Committee concluded that it should be proscribed because of the risk of three consequences: the potential for civil disorder due to an adverse victim reaction to hate propaganda, damage to victims' reputations due to the dissemination of hate propaganda, and the psychological stress suffered by victims of hate propaganda.[35]

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[33] *Ibid.* at 11.
[34] *Ibid.* at 24-25.
[35] *Ibid.* at 27-31.

The Committee went on to consider whether existing legislative measures could be used to stem the tide of hate in Canada. The Committee analyzed the *Code* offences of sedition,[36] unlawful assemblies and riots,[37] causing a disturbance,[38] defamatory libel,[39] and spreading false news.[40] For numerous reasons the Committee found that these *Code* provisions did very little to protect groups from the harms of hate propaganda.[41]

The Committee primarily focused on areas within federal jurisdiction. Consequently, the impact of human rights legislation (much of which is within the provincial sphere) on hate propaganda was not examined in detail. However, as a last resort, the Committee examined federal legislation other than the *Code* to determine if there was any other existing legislation which could effectively combat hate propaganda. What was then s.7 of the *Post Office Act*[42] granted the Postmaster-General wide powers to prevent the mailing of any material he reasonably believed to be obscene, blasphemous, or seditious. The main problem with this legislative provision was a practical one: how does one detect hate propaganda in the mail?[43]

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[36] Currently contained in ss.59-61 of the *Code*.
[37] Currently contained in ss.63-66 of the *Code*.
[38] Currently contained in s.175 of the *Code*.
[39] Currently contained in s.298-301 of the *Code*.
[40] Currently contained in s.181 of the *Code*.
[41] Cohen Report, *supra* note 31 at 36-49.
[42] *Post Office Act*, s.7, R.S.C. 1970, c.P-14 [hereinafter *Post Office Act*].
[43] Canada Post utilized s.7 of the *Post Office Act* and cut off Ernst Zundel's mail service on the grounds that he had been using the mails to spread anti-Jewish propaganda. Canada Post's action prevented Zundel, a well-known hate propagandist, from receiving mail but it could not prevent him from sending mail anonymously. In

Ultimately, the Cohen Report recommended that the problem of hate propaganda warranted legislative intervention. The Committee ascertained that existing legislation that could be used to control the dissemination of racial hatred was deficient in numerous ways. As a result, it recommended that the *Code* be amended to include the offences of the advocacy of genocide, the public incitement of hatred likely to lead to a breach of the peace, and the wilful promotion of hatred. The amendments proposed by the Committee were, with a few minor changes, adopted and presented to Parliament as Bill C-3. Dean Maxwell Cohen notes:

> In the voting on the Bill in the House the Conservatives and the Creditistes were mostly against the Bill while some N.D.P. and Liberals also were opposed, but significantly a very large proportion of the House was absent on the Third Reading where the vote was 89 to 45, with 127 not voting or absent from the Chamber. In the Senate no Hearings were held, but there was determined debate and a serious but unsuccessful effort was made to have the Bill referred, before enactment, to the Supreme Court of Canada on the ground that it might be in conflict with the Canadian Bill of Rights and possibly other constitutional or statutory principles. In any event, although party lines were crossed in the voting, the Bill passed the Senate and received Royal Assent on June 11, 1970.[44]

As stated earlier, the Cohen Committee concluded that racial hatred in Canada was limited to marginal extremist groups. They came to this conclusion because their focus was on an extreme symptom of racism: the creation and dissemination of hate propaganda. While it may be true that only marginal extremist groups produce and

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1982, Zundel persuaded Canada Post to reinstate his mail service. The Crown corporation gave no reasons for its decision. ("National General News" *Canadian Press 85* (28 February 1985) (QL).)

[44] M. Cohen, "The Hate Propaganda Amendments: Reflections On A Controversy" (1971) 9 Alta. L. Rev. 103 at 111.

distribute hate propaganda, that does not necessarily mean that racial hatred is limited to these groups. Racist publications are not the only evidence of racism in Canada. Further evidence of racism may be found by considering the position of some of Canada's visible minority groups, historically and currently, and by considering other manifestations of race-based discrimination in government laws and actions and societal attitudes and practices.

IV. THE TREATMENT OF VISIBLE MINORITY GROUPS IN CANADA

A. ABORIGINAL CANADIANS

The mistreatment of Canada's aboriginal peoples began with the arrival of European colonizers. In New France, slavery of aboriginals became an established institution as early as the seventeenth century.[45] After the abolishment of slavery, an attempt was made to assimilate native peoples through the operation of church boarding schools, whereby native youth were often forcibly removed from their communities and instructed in the inferiority of their race and cultures.[46]

A recital of the deplorable way in which the European colonizers of Canada treated Canada's native people would lead most rational people to question the

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[45] S. Barrett, *Is God a Racist? The Right Wing in Canada* (Toronto: University of Toronto Press, 1987) at 300. See also, O.P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart Inc., 1992) at 13, 87, 158 and 195.

[46] M.G. Kline, "Child Welfare Law, Ideology and the First Nations" (Faculty of Law, Osgoode Hall Law School, 1990) at 8-11 [unpublished]. See also, L.R. Bull, "Indian Residential Schooling: The Native Perspective" (1991) 18 Can. J. Nat. Educ. 1, N.R. Ing, "The Effects of Residential Schools on Native Child-Rearing Practices" (1991) 18 Can. J. Nat. Educ. 65, and O.P. Dickason, *supra* note 45 at 333-338.

morality, at least by today's standards, of Canada's "pioneers." It must be remembered that European traders and colonizers thought of Canada's indigenous people as "savages."[47] Because they considered native peoples a lower form of humanity, the Europeans believed that, when dealing with natives, they were absolved from many of the ethical and moral constraints observed when dealing with fellow Europeans. As stated by Somers:

> Stereotypes have an important function in the maintenance of racism. Between 1500 and 1900 A.D., the stereotype of Native people as savage served to justify racial discrimination against Native Canadians and the dispossession of their lands. Dispossession and its legacy have created a powerful/powerless relationship between whites and Native peoples in Canada.[48]

The slavery of native peoples, the dispossession of their lands,[49] and the forced enrollment of native youth in residential schools were all acts of official racism against Canada's aboriginal peoples. The legacy of this official racism can be seen by the fact that native people today "have the lowest incomes, the poorest health, and the highest

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[47] The European colonization of North America was based on a model which recognized European sovereignty in lands discovered by its subjects which were occupied by "infidels" and "savages". Thus, the basis of the Europeans' superior rights to North America was the aboriginal populations' supposed cultural inferiority (R.A. Williams, "Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System" (1995) 2 Rev. Constit. Studies 146 at 162 and 163.)

[48] M.G. Somers, *supra* note 9 at 27. As noted by Albert Memmi, "racism is the racist's way of giving himself absolution." (A. Memmi, "Attempt at a Definition" in *Dominated Man: Notes Toward a Portrait* (Boston: Beacon Press, 1969) 185 at 194.)

[49] For a more detailed account of the dispossession of land from Canada's indigenous population, see O.P. Dickason, *supra* note 45 at 176-420.

rates of unemployment of any single group in the country."[50] Moreover, they are underrepresented in the educational system.[51]

Most troubling, perhaps, is the fact that a number of recent Royal Commission and Justice Inquiry reports seem to indicate that official racism aimed at Canada's indigenous peoples is flourishing in Canada today. The Royal Commission on the wrongful prosecution and conviction of Donald Marshall for murder concluded that the criminal justice system was not "color blind" and actually failed Marshall in part because he was native.[52]

The Manitoba Judicial Inquiry into the deaths of Helen Betty Osborne and John Joseph Harper[53] found that racism was prevalent against natives within the justice system. John Joseph Harper, the Executive Director of the Island Lake Tribal Council, was killed in a confrontation with a Winnipeg police officer. The Report of the Judicial Inquiry concluded that the police officer was motivated to confront Harper primarily because of Harper's race.[54] Despite this fact, the officer was absolved of any wrongdoing by the Police Department's Firearms Board of Inquiry. The police officer

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[50] V. Valentine, "Native Peoples and Canadian Society: A Profile of Issues and Trends" in R. Breton, J. Keitz, V. Valentine, eds., *Cultural Boundaries and the Cohesion of Canada* (Montreal: The Institute for Research on Public Policy, 1980) at 47.
[51] S. Barrett, *supra* note 45 at 300.
[52] Nova Scotia, *Royal Commission on the Donald Marshall Jr., Prosecution: Report* (Halifax: McCurdy's Printing and Typesetting, December, 1989) (Chair: T.A. Hickman).
[53] Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report: The Deaths of Helen Betty Osborne and John Joseph Harper*, vol. 2 (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair).
[54] *Ibid.* at 5.

was known to say afterwards, "[t]he natives drink and they get in trouble. Blaming the police for their troubles is like an alcoholic blaming the liquor store for being open late."[55] McKenna makes the following observations in regard to the evidence presented at the Manitoba Judicial Inquiry:

> Witnesses testified to police officers' expressions of derogatory racist remarks against Indians during the course of their duties . . . A journalist...also testified to the Inquiry of a joke that made the rounds of the Public Safety Building in Winnipeg after the shooting of Harper by Winnipeg Police. To the question "[h]ow do you wink at an Indian? . . . [t]he answer was a pantomimed pull of a trigger." The Commission said of the Winnipeg Chief of Police, "Chief Stephen's readiness to disregard racism is disturbing" . . . [The Commission noted] a lack of concern and action by the Chief on the incidence of racism within his department[.][56]

As a result of these observations, McKenna concludes as follows:

> I submit that the evidence heard by the Commission revealed not only racist attitudes but public expressions of racial hatred against Indians by police officers. There is evidence, too, that such expressions of racial hatred were condoned by high ranking officers who had the authority to take disciplinary measures but did not do so.[57]

Other justice inquiry reports have also found that many police officers bring an attitude of racial superiority to their duties as evidenced by their manner of dealing with native people. For instance, Judge Sarich, who authored the Cariboo-Chilcotin Justice

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[55] *Ibid.*

[56] I.B. McKenna, "Canada's Hate Propaganda Laws - A Critique" (1994) 26 Ottawa L. Rev. 159 at 171-172.

[57] *Ibid.* at 172.

Inquiry Report, found that many police officers unquestionably accepted allegations made against natives, while keeping a closed mind to anything they raised in response.[58]

Even when individual police officers do not bring racist attitudes to their job, there is systemic discrimination in policing. One example of this systemic discrimination is found in the phenomena of over-policing and its impact on higher aboriginal crime rates:

> Police use race as an indicator for patrols, for arrests, detentions . . . For instance, police in cities tend to patrol bars and streets where Aboriginal people congregate, rather than the private clubs frequented by white business people . . . This does not necessarily indicate that the police are invariably racist (although some are) since there is some empirical basis for the police view that proportionately more Aboriginal people are involved in criminality. But to operate patrols or to allocate police on . . . [this] basis . . . can become a self-fulfilling prophecy: patrols in areas frequented by the groups that they believe are involved in crimes will undoubtedly discover some criminality; when more police are assigned to detachments where there is a high Aboriginal population, their added presence will most assuredly detect more criminal activity.
>
> Consider, for instance, the provincial offence of being intoxicated in a public place. The police rarely arrest whites for being intoxicated in public. No wonder there is resentment on the part of Aboriginal people arrested simply for being intoxicated. This situation very often results in an Aboriginal person being charged with obstruction, resisting arrest or assaulting a peace officer. An almost inevitable consequence is incarceration . . . Yet the whole sequence of events is, at least to some extent, a product of policing criteria that include race as a factor and selective enforcement of the law.[59]

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[58] *Report on the Cariboo-Chilcotin Justice Inquiry* (British Columbia), Judge Anthony Sarich, Commissioner (1993), at 10-11.

[59] T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest, Presentations made at a Conference on Aboriginal Peoples and Justice*, comp. R. Gosse, J.Y. Henderson, and R. Carter (Saskatoon: Purich Publishing, 1994) 273 at 273-274.

The most recent Royal Commission Report on Aboriginal Peoples in Canada concluded that the justice system has failed native people. This Report found that aboriginal people in Canada are less likely to get bail, tend to spend more time in pre-trial detention, spend less time with their lawyers and, if convicted of an offence, are more likely to be incarcerated than non-natives.[60] It has long been well documented that native peoples are overrepresented in jails[61] but, since 1974, the over-representation of natives in Canadian prisons has increased.[62]

B. AFRICAN CANADIANS[63]

Slavery in Canada was not reserved only for the aboriginal population. The first black slaves arrived in Canada in 1608; by 1705 their number exceeded 4,000.[64] Slavery actually lasted longer in Canada than it did in the northern United States. In

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[60] Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, (Ottawa: Minister of Supply and Services Canada, 1996) at 28 [hereinafter *Bridging the Cultural Divide*].

[61] See, for example, S. Barrett, *supra* note 45 at 300 and M. Jackson, *Locking Up Natives in Canada*, Report of the Canadian Bar Association Committee on Imprisonment and Release (1988); reprinted in U.B.C. L. Rev. 23 (1989) 198 at 215 [hereinafter *Locking Up Natives*]. Some of the more startling 1988 statistics include: 10% of the federal penitentiary population is native, but they only constitute 2% of Canada's whole population. In the Prairies, natives constitute 5% of the total population but 32% of the penitentiary population. For some western provincial correctional systems the numbers are even more telling. For instance, in Saskatchewan, native people represent 6-7% of the population but make up 60% of provincial prison admissions (*Locking Up Natives*, *supra* note 61 at 215).

[62] *Bridging the Cultural Divide*, *supra* note 60 at 28-29.

[63] For the purposes of this thesis, "African Canadians" includes all members of the black community.

[64] D. Hill, *Human Rights in Canada: A Focus on Racism* (Canadian Labour Congress, 1977) at 7.

fact, many black people escaped slavery in Canada for freedom in New England.[65] Finally, in 1793, the Legislative Assembly of the Province of Upper Canada passed *An Act to Prevent the Further Introduction of Slaves and to Limit the Term of Enforced Servitude Within this Province*, S.U.C. 1793, c.8. From the Act's title one incorrectly assumes that the legislators of the Province of Upper Canada recognized the error of their ways because, although the statute prohibited the further introduction of slaves into Upper Canada, it declared that those who were already slaves remained so and their children would be born slaves and not be freed until they reached the age of twenty-five.[66] It was not until 1833 and the passing of an *Act for the abolition of slavery throughout the British Colonies*, (U.K.) 1833 3 & 4 Will 4, c. 73 that slavery was finally abolished in Canada.

Like the natives, the suffering of black people in Canada as a result of official racism did not end with the abolishment of slavery. Again, just as with the natives, schools were used as tools in the government's policy of racism against people of African origin in Canada. In 1849, school segregation was established by the *Act for the better establishment and maintenance of public schools in Upper Canada* S.U.C.

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[65] R. Winks, "The Canadian Negro: A Historical Assessment - Part I" (1980) J. of Neg. His. 283 at 288.

[66] W.S. Tarnopolsky, "The Control of Racial Discrimination" in O. McKague, ed., *Racism in Canada* (Saskatoon, Saskatchewan: Fifth House Publishers, 1991) 179 at 180.

1849, 22 Vict. c. 65. In fact, it was not until 1965 that the last segregated school in Ontario closed.[67]

It may be thought that such acts of official racism simply do not occur in today's Canada. However, relationships between predominantly white police forces and black citizens in Toronto and Montreal are currently at very dangerous and volatile levels. As stated by McKenna:

> The large demonstration of black Canadians in Toronto [in 1992] following the acquittal of Los Angeles police officers charged with beating Rodney King [a black American motorist] was provoked, in part, by a sense of grievance among black Canadians about the harassment and lack of respect shown to them by police and other members of the community.[68]

Racism has had a profound impact on the lives of African Canadians. Empirical evidence of this impact can be found in the 1981 and 1986 census, which both reveal that black workers with the same level of education earn, on average, seventy percent of what white workers earn and eighty-five percent of what Asians earn.[69] Discrimination also plays a part in the jobless statistics for African Canadians. In 1984, the Economic Council of Canada found that job offers favored whites over blacks by a three to one ratio.[70]

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[67] D. Hill, *supra* note 64 at 7.
[68] I.B. McKenna, *supra* note 56 at 173-174.
[69] L. Sweet, "The Hate that Shames Canada" *The Toronto Star* (22 February 1992) A1.
[70] *Ibid.* Again, it can be argued that statistics on income levels and joblessness do not definitively prove racism. However, it should be noted that the Supreme Court of Canada has recently acknowledged that discrimination almost always has adverse economic consequences. The Court held that economic discrimination is inherently connected to discriminatory social and political attitudes which have prevailed in the past and continue in the present (*Egan* v. *Canada* (1995), 124 D.L.R. (4th) 609 at 673-

C. ASIAN CANADIANS[71]

The history of Asians in Canada has been one of manipulation and betrayal. This legacy began with the arrival of Chinese labourers in the 1800s to work on the Canadian Pacific Railway. After the railway was completed in 1885, the government of Canada imposed a head tax on every new Chinese immigrant. This head tax amounted to fifty dollars per person and by 1903 increased to five hundred dollars per person to discourage further Chinese immigration.[72]

In 1908 the federal government reduced East Indian immigration by mandating that anyone who immigrated to Canada from India had to do so by continuous passage, a nearly impossible feat at that time.[73] Nevertheless, in 1914, the ship Komagatu Maru arrived in Vancouver with four hundred Sikhs aboard. But the immigration officials would not admit the passengers. As a result, after waiting two months in the harbour with sick, hungry and dehydrated men, women, and children on board, the ship set sail. Only twenty-two people on board, all of whom had previously lived in Canada, were allowed ashore.[74]

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674 (S.C.C.) [hereinafter *Egan*]). In *Egan*, the Court made use of statistics, specifically suicide rates, to show that homosexuals have been, and continue to be, targets of discrimination. It can be argued that other types of statistics, such as economic statistics, are also legitimate indicators of discrimination.

[71] For the purposes of this thesis "Asian Canadians" includes members of the Chinese, Japanese and Indo-Pakistani communities.

[72] B. Bolaria and P. Li, *Racial Oppression in Canada* (Toronto: Gramond Press, 1985) at 86.

[73] D. Hill, *supra* note 64 at 10.

[74] T. Ferguson, *A White Man's Country* (Toronto: Doubleday Canada, 1975) at 16.

Of those Chinese, Japanese, and East Indian people who overcame the substantial obstacles erected by the Canadian government and actually immigrated to Canada, they arrived to find that they and their Canadian-born children could not vote. As stated by Somers:

> In 1895 the government of British Columbia denied the right to vote to Canadians of Chinese, Japanese and East Indian heritage. By doing so, the province also effectively barred them from the federal franchise, since the *Dominion Elections Act* automatically denied the federal vote to anyone who did not have the right to vote provincially. This restriction was not lifted for Chinese and East Indian Canadians until 1947. Japanese Canadians had to wait until 1948. While in force, this law also barred these groups from certain occupations for which licenses were required, since having one's name on a voters' list was a prerequisite for obtaining a license. Meanwhile, of course, members of these groups were still subject to taxation.[75]

One of the most infamous examples of official racism in Canada was the internment of Japanese Canadians during World War II. In February 1942 the federal government ordered the expulsion of 22,000 Japanese Canadians living on or near the Pacific Coast. These Canadians were stripped of their property and confined in detention camps all in the name of national security. Despite this rationale, in 1944 Prime Minister Mackenzie King acknowledged that not one Japanese Canadian had committed any acts of sabotage during the war.[76] In her book, *The Politics of Racism*, Sunahara notes that the abuse directed at Japanese Canadians did not begin with their internment in 1942 but

> [was] the culmination of a long history of discrimination resulting from Canadian social norms that cast Asians in the role of second-class citizens.

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[75] M.G. Somers, *supra* note 9 at 40.
[76] D. Hill, *supra* note 64 at 10.

> Stripped of their political rights, Asians had traditionally been politically castrated targets for the rhetoric of B.C. politicians seeking scape-goats for the province's ills. The war only provided an ideal atmosphere for the seeds of repression to flourish.[77]

The official racism perpetuated by the government has left a legacy of racial hatred in Canadian society. For instance, in the 1970s and 1980s, "paki-bashing" was a pastime in which many teenagers claimed to participate.[78] Moreover, in the fall of 1976, a brawl broke out between whites and East Indians in a Canadian Pacific work train near Edmonton when the East Indians discovered that their sleeping car had a racial slur painted on it.[79] Most recently, in the early 1990s, derogatory stickers depicting stereotypical images of Oriental and East Indian persons in a red circle with a red line through the circle were produced and distributed in Saskatchewan.[80] Clearly, members of the Asian community are still targets of racial hatred in Canada.

V. NEW DEVELOPMENTS AND NEW STUDIES

In recent years a new weapon, the Internet, has emerged in the arsenal of the hatemonger. This new weapon allows access to hate propaganda with the ease of pushing a button. The Internet has been embraced by those who love to hate. Rabbi

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[77] A.G. Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War* (Toronto: James Lorimer & Co., 1981) at 161.
[78] D. Hill, *supra* note 64 at 5. "Paki-bashing" is the physical assault of members of the Indo-Pakistani community by a group of people that is usually motivated by racial animus.
[79] *Ibid.* at 5.
[80] *Saskatchewan (Human Rights Commission)* v. *Bell* (1991), 88 D.L.R. (4th) 71 (Sask. Q.B.) [hereinafter *Bell*].

Abraham Cooper of the Simon Wiesenthal Centre says that there are, at present, 75 hate groups on-line.[81]

Many neo-Nazis, including Canadian ones, view the Internet as a golden opportunity to spread their message of intolerance. George Burdi is one such individual. Burdi is a twenty five year-old Canadian living in Windsor, Ontario. He is the lead singer for the rock band *Rahowa,* an acronym for Racial Holy War. As its name implies, it is a white supremacist rock band whose lyrics constitute hate propaganda. In addition to his musical pursuits, Burdi has established a magazine, an Internet home page, and a weekly electronic newsletter, all of which promote his cause. He is viewed by many to be one of the most influential leaders of the white power movement. In his words, "[w]e have big plans for the Internet . . . It`s uncontrollable, [i]t`s beautiful - uncensored."[82]

Indeed, Burdi may be correct in his assertion that keeping hate propaganda off the Internet may be technologically impossible. Germany's largest Internet provider, Deutsche Telekom, recently attempted to block access to a Santa Cruz company that maintains certain well-known hate propagandists' World Wide Web sites. Within days, free speech proponents, such as many American universities, duplicated these Web pages. To block these mirror sites in Germany, Deutsche Telekom and other providers

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[81] S. Talty, "Spinning Hate's World Wide Web" *The Edmonton Journal* (17 March 1996) F3.
[82] *Ibid.*

would have to block access to everything on the Internet from these universities, a drastic step that many Internet providers are not willing to take.[83]

Is hate propaganda via the Internet and other means reaching a receptive audience or are hate messages being resoundingly rejected by Canadians today? Several studies and polls since the Cohen Report suggest that racism remains a significant problem in modern Canada. In its 1989 annual report, the Canadian Human Rights Commission stated:

> The demons of racial and cultural prejudice have never been either officially or unofficially exorcised from Canadian society. We may, on occasion, have been marginally more enlightened than our southern neighbours, but instances of racism and intolerance are deeply etched in the historical record and, for

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[83] *Ibid.* A recent American case contains an excellent review of expert evidence concerning the Internet and the ability to block content on it. This case is *American Civil Liberties Union* v. *United States*, Nos. CIV. A. 96-963, CIV. A. 96-1458, 1996 WL 311865 (E.D.Pa., June 11, 1996) [hereinafter *ACLU*]. In *ACLU*, provisions of the *Communications Decency Act of 1996*, which constitutes Title V of the *Telecommunications Act of 1996*, Pub. L. No. 104-104, s 502, 110 Stat. 56, 133-35 [hereinafter CDA] were challenged on constitutional grounds. These provisions of the *CDA* made it a criminal offence to send or create, by means of a telecommunication device or interactive computer service, any communication which is "indecent" or "patently offensive" to minors (s. 502 *CDA*). The Court held that the terms "indecent" and "patently offensive" were impermissibly vague and therefore, the legislative provisons were unconstitutional. In terms of its discussion of the Internet, *ACLU* emphasizes the fact that, from its inception, the Internet was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communication without direct human involvement or control. It has the automatic ability to re-route communication if one or more individual links are unavailable. Since there is no centralized storage unit, control point, or communicaton's channel for the Internet, it is not technologically feasible for a single entity to control all of the information on it. The only way to effectively block information on the Internet is to block everything coming from an impugned source, because if one of the links to a source is blocked, the system automatically finds another link to complete the connection (*ACLU*, *supra* note 83 at *13-69.)

that matter, not hard to find in the daily newspapers.[84]

This conclusion is bolstered by a 1995 report prepared for the Department of Justice, which estimated that there were approximately 60,000 hate crimes committed in nine urban centres in Canada in 1994.[85] The report states that, of those that were reported, 61% of hate crimes were directed against racial minorities, 23% were directed against religious minorities, 5% were directed against ethnic minorities, and 11% were directed against gays and lesbians.[86]

In January 1992, an immigration department survey showed that one third of the people polled agreed that it was important to "keep out people who are different from most Canadians."[87] An Angus Reid poll prepared for Employment and Immigration Canada found that 43% of people polled in August 1989 felt that there

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[84] Canadian Human Rights Commission, *Annual Report 1989* (Ottawa: Ministry of Supply and Services Canada, 1990) at 22.

[85] Canada, Department of Justice, *Disproportionate Harm: Hate Crime in Canada* (Working Document) by J.V. Roberts (Research, Statistics and Evaluation Directorate, Policy Sector, 1995) at xii and 28 [hereinafter Roberts' Report]. A crime is only classified as a "hate crime" when, the act is based, in whole or in part, upon the victim's race, religion, nationality, ethnic origin, sexual orientation, gender or disability. Offences committed under the hate propaganda sections of the *Code* are not considered "hate crimes." Instead, that label is reserved to describe offences like mischiefs, assaults, uttering threats, robberies, and break and enters - in other words, traditional criminal law offences, where the offender is motivated by a characteristic of the victim that identifies the victim as a member of a group towards which the offender feels some animosity. It should be noted that a significant percentage of hate crimes are violent in nature. For instance, of the hate crimes reported to police in Toronto in 1993, 37% were assaults and 77% of those assaults were directed at racial groups (see Appendix A, tables 8 and 9, at 66-67 of Roberts' Report).

[86] *Ibid.* at xi.

[87] "Poll showed hostility to immigrants" *The [Toronto] Globe and Mail* (14 September 1992) A4.

were too many immigrants coming to Canada.[88] At that time, 71% of immigrants were coming from predominantly nonwhite source countries.[89] In 1991 another Angus Reid poll concluded that most Canadians felt less comfortable with Indo-Pakistanis, Sikhs, West Indian Blacks, Arabs, and Muslims. The same study found that 32% of Canadians polled felt it was better if immigrants forgot their cultural backgrounds as soon as possible.

Other opinion polls reveal even more startling results. A CTV - Angus Reid poll conducted in October 1994 stated that 13% of Canadians think that some races are naturally superior to others.[90] On March 5, 1982, the Multiculturalism Minister Jim Fleming released figures from a Gallup poll on racial attitudes in Canada. The poll results showed that 31% of Canadians would support organizations that worked towards preserving Canada for whites only. 12% of those polled would cut off all non-white immigration to Canada.[91] Consequently, it is not surprising that polls have shown that 60% of Canadians believe racism is increasing and 25% have labelled it one of the nation's most pressing problems.[92]

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[88] Angus Reid Group Inc., *Immigration to Canada: Aspects of Public Opinion*, (Report prepared for Employment and Immigration Canada, Winnipeg, October, 1989), IM-074-11-89, 4-20.
[89] Immigration Canada, *Immigration to Canada: A statistical overview* (Employment and Immigration Canada, Ottawa-Hull, November, 1989), IM 062, 9-23.
[90] "National General News" *Canadian Press 94* (10 November 1994) (QL).
[91] Ministry of State Multiculturalism, *Race Relations and the Law* (Ottawa: Ministry of Supply and Services Canada, 1983) at 37.
[92] "National General News" *Canadian Press 93* (21 March 1993) (QL).

VI. CONCLUSION

The Cohen Committee concluded that racial hatred in Canada was limited to extremist groups marginal to Canadian society. Yet the historical analysis undertaken in this chapter demonstrates that racial hatred is traditional and not as marginal a phenomena as the Cohen Committee found it to be. "[T]he tolerance we know is historically only a thin and recently applied veneer on Canadian society."[93] As stated by McKenna:

> This challenges the orthodox assumptions that extremist groups are a minimal threat to Canadian society because their message will be offensive to, and rejected by, mainstream Canadian society. If the average Canadian has already internalized attitudes of racial hatred, fed historically with a steady diet of official racism and racial hatred, extremist messages have a rather more receptive audience than the orthodox view would have us believe. The threat to public order and to target groups is, accordingly, heightened.[94]

Hate propaganda perpetuates barriers to the dismantling of systemic racial discrimination.[95] It does this not because employers, teachers, landlords, and police are likely to be active consumers of hate propaganda. It is the existence of hate propaganda in general society that makes this effect possible. As noted by Matsuda, herself a member of a visible minority group:

> Research in the psychology of racism suggests a related effect of racist hate propaganda: At some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but because it is present repeatedly, it is there before us. "Those people" are lazy, dirty, sexualized, money-grubbing, dishonest, inscrutable

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[93] A.G. Sunahara, *supra* note 77 at xi.
[94] I.B. McKenna, *supra* note 56 at 166.
[95] *Ibid.* at 182.

> we are told. We reject the idea, but the next time we sit next to one of "those people," the dirt message, the sex message, is triggered. We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us. In conducting research . . . I read an unhealthy number of racist statements. A few weeks after reading about a "dot busters" campaign against immigrants from India, I passed by an Indian woman on my campus. Instead of thinking, "What a beautiful sari," the first thought that came into my mind was "dot busters."[96]

If a member of a visible minority group who has dedicated a great deal of her academic life to the study of the pernicious effects of racism can be affected by hate propaganda, albeit in a transitory way, the vulnerability of every member of society to the subtle effects of hate propaganda is made more clear. Perhaps a landlord, at even an unconscious level, will prefer renting to a white couple as opposed to an East Indian couple after being subjected to a "dot busters" campaign. Thus, while it may be correct that only marginal extremist groups produce and distribute hate propaganda, racial hatred in modern Canada extends beyond these extremist groups and the effect of hate propaganda cannot be easily discounted.

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[96] M.J. Matsuda, *supra* note 11 at 25-26. The "dot" in "dot busters" refers to the "bindi," a cosmetic red dot traditionally worn by Indian women on their foreheads to signify that they are married and their husbands are alive. In modern India the bindi has lost its traditional significance and is worn by married and unmarried women alike.

CHAPTER TWO

THE WILFUL PROMOTION OF HATRED

I. INTRODUCTION

Chapter One documents the history of racial hatred in Canada and the fact that racism continues to exist as a real problem in modern Canadian society. Spokespeople for racial and ethnic minorities, being cognizant of Canada's legacy of racial discrimination, made representations before the Special Joint Committee of the Senate and the House of Commons on the Constitution in support of a *Charter*.[97] Many minority group members thought that the *Charter* would protect them against racism and discrimination, rather than serve as a shield for racists.[98]

Therefore, Canada's racial and ethnic minorities were shocked to find that criminal prohibition of racist expression may infringe upon individuals' right to freedom of expression guaranteed by s.2(b) of the *Charter*,[99] which states:

> 2. Everyone has the following fundamental freedoms:
> . . .

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[97] Canada, Senate and House of Commons, 1st sess., 32nd Parl., *Special Joint Committee on the Constitution of Canada Proceedings*, 1980-81, 29:122 and E. Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" (1991) 11 Windsor Y.B. Access Justice 46 at 71.

[98] I. Cotler "Hate Literature" in R.S. Abella & M.L. Rothman, eds., *Justice Beyond Orwell* (Montreal: Canadian Institute for the Administration of Justice, 1985) 117 at 119.

[99] One representative of Canada's racial and ethnic minorities, while attending a conference on Race Relations and the Law, vocalized the collective outrage felt by these groups as follows: "We've been had . . . if we had known that this would be the effect of the *Charter*, we would never have lobbied for it . . ." (I. Cotler, *supra* note 98 at 119).

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.]

Thus, Canada's minority groups were faced with the possibility that anti-hate propaganda legislation might be deemed unconstitutional. Ironically, the *Charter* for which they lobbied so strongly had become a potential weapon against them, and it is this use of the *Charter* that constitutes the subject of Chapter Two. More specifically, this chapter examines the constitutional validity of one of the hate propaganda offences, the wilful promotion of hatred, considered in *Keegstra*.

This chapter first outlines the relevant legislative provisions and facts in *Keegstra*. The scope that has been and should be attributed to s.2(b) of the *Charter* is then discussed. Moreover, this discussion occurs within the context of assessing the Court's determination in *Keegstra* that hate propaganda is protected expression under s.2(b). The tests governing the application of s.1 of the *Charter*[100] are described, and the reasoning of the Court's s.1 analysis in *Keegstra* is critiqued. In addition, I determine the appropriateness of using criminal law to curb hate propaganda. Other constitutional issues raised by *Keegstra* are also briefly discussed. And, finally, litigation under the offence of wilfully promoting hatred since *Keegstra* is examined.

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[100] Section 1 of the *Charter* states: "1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

II. RELEVANT LEGISLATIVE PROVISIONS AND FACTS

Of the three substantive offences contained within the hate propaganda sections of the *Code*, only the wilful promotion of hatred has been the subject of direct litigation.[101] As illustrated below, s.319(2) of the *Code* makes the wilful promotion of hatred a criminal offence:

> 318.
> . . .
> (4) In this section [referring to s.318 as a whole], "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.
> 319.
> . . .
> (2) Every one who, by communicating statements, other than in private communication, wilfully promotes hatred against any identifiable group is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> (b) an offence punishable on summary conviction.
> (3) No person shall be convicted of an offence under subsection (2)
> (a) if he establishes that the statements communicated were true;
> (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
> (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
> . . .
> (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
> (7) In this section,

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[101] A prosecution was initiated under the advocating genocide provision of the *Code* in Manitoba, however the charge was stayed prior to trial by the Crown because it was discovered that the police had engaged in improper conduct in the gathering and presentation of evidence. For more information concerning this prosecution see "National General News" *Canadian Press 92* (8 September 1992) (QL).

> "communicating" includes communicating by telephone, broadcasting or other audible or visible means;
> "identifiable group" has the same meaning as in section 318;
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;
> "statements" includes words spoken or written or recorded electronically or otherwise, and gestures, signs or other visible representations.

James Keegstra was charged under what is now s.319(2) of the *Code*. Keegstra taught a grade twelve social studies class at Eckville High School, where he had been teaching since 1968.[102] Eckville is a community of about 800 inhabitants in central Alberta. Although he had scant training as a social studies expert, Keegstra ended up teaching many of the social studies classes at Eckville High School. This occurred because Keegstra appeared to be an effective teacher, was well liked by his students, and had taken two history courses at University. These factors coupled with the fact that Eckville High School only had seven full-time teachers at the school, none of which had been specially trained in history, made Keegstra the natural choice to teach social studies.[103]

But Keegstra rejected conventional history books as censored material and used his own selected readings, which were not part of the usual curriculum. His perspective on world history is described as follows:

> Mr. Keegstra's teachings attributed various evil qualities to Jews. He thus described Jews to his pupils as "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". He taught his classes

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[102] S. Mertl & J. Ward, *Keegstra: The Trial, The Issues, The Consequences*, (Saskatoon: Western Producer Prairie Books, 1985) at 1, D. Bercuson & D. Wertheimer, *A Trust Betrayed* (Toronto: Doubleday Canada Limited, 1985) at 17.
[103] D. Bercuson & D. Wertheimer, *supra* note 102 at 18.

> that Jewish people seek to destroy Christianity and are responsible for depressions, anarchy, chaos, wars and revolution. According to Mr. Keegstra, Jews "created the Holocaust to gain sympathy" and, in contrast to the open and honest Christians, were said to be deceptive, secretive and inherently evil. Mr. Keegstra expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered.[104]

In 1981, as a result of parental complaints about Keegstra's unorthodox teaching, district school superintendent Robert David warned Keegstra to stop teaching Jewish conspiracy theory as if it were fact. However, Keegstra did not stop. More than a year after being informed of the content of Keegstra's social studies classes, the school board finally dismissed Keegstra in December 1982. In 1983, the Royal Canadian Mounted Police began to investigate Keegstra and his teaching. On January 11, 1984, with the consent of the Attorney General of Alberta, Jim Keegstra was charged under what is now s.319(2) of the *Code*.

Keegstra challenged the constitutionality of what are now ss.319(2) and 319(3)(a) of the *Code*. These issues were finally resolved by the Supreme Court of Canada when a four to three majority upheld the constitutionality of ss.319(2) and 319(3)(a). Dickson C.J.C. wrote the majority judgment and McLachlin J. wrote the dissenting judgment. They agreed that s.319(2) of the *Code* infringed s.2(b) of the *Charter* and that s.319(3)(a) of the *Code* infringed s.11(d) of the *Charter*,[105] but they disagreed as to whether these provisions were saved by s.1.

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[104] *Keegstra, supra* note 16 at 144.

[105] Section 11(d) of the *Charter* states: "11. Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[.]"

III. THE SCOPE OF FREEDOM OF EXPRESSION

Dickson C.J.C. began his judgment in *Keegstra* by defining the appropriate scope to be given to the freedom of expression as guaranteed by s.2(b) of the *Charter*. In his analysis of the scope of s.2(b), he relied heavily upon the Supreme Court's ruling in *Irwin Toy*. In *Irwin Toy*, the Court laid down a two-step test designed to establish s.2(b) infringement. The first step involves a determination of whether the activity in question is within the sphere of conduct protected by freedom of expression. The second step deals with whether the purpose or effect of the government action restricts free expression.

The Court, in *Irwin Toy*, held that s.2(b) protects any activity that "conveys or attempts to convey a meaning."[106] The content of expression is the meaning sought to be conveyed. Section 2(b) protects all content of expression because:

> Freedom of expression was entrenched . . . to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is . . . "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.[107]

The Court also stated that, while all content of expression was protected by s.2(b), the same could not be said for all forms of expression. In particular, the Court held that violence as a form of expression received no s.2(b) protection.[108]

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[106] *Irwin Toy*, *supra* note 1 at 607.
[107] *Ibid.* at 606.
[108] *Ibid.* at 607.

In *Keegstra*, Dickson C.J.C. followed the Court's ruling in *Irwin Toy* and held that s.2(b) protected all content of expression and all forms of expression except violence. Thus he rejected the argument that s.2(b) should be interpreted in light of ss.15 and 27 of the *Charter* as well as the anti-discrimination and anti-hate international instruments to which Canada is a party.[109] He also concluded that hate propaganda

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[109] Section 15 of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The anti-hate international instrument, to which Canada is a party, that is most relevant to any discussion of the constitutionality of s.319(2) of the *Code* is the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969) 660 U.N.T.S. 212. Canada signed this convention on August 24, 1966 and ratified it on October 14, 1970. Article 4 is the key article in this instrument. It states as follows:

> State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

was not analogous to violence because hate propaganda was criminalized for the repugnancy of its meaning, not because physical harm was imminent upon its utterance. Dickson C.J.C. found that, since s.319(2)'s purpose was to restrict the content of expression by singling out certain messages which were not to be conveyed, s.319(2) of the *Code* infringed s.2(b) of the *Charter*.

The approach adopted by Dickson C.J.C. is far from uncontroversial.[110] First, the approach adopted towards the freedom of expression by the Supreme Court of Canada in *Irwin Toy*, and affirmed by Dickson C.J.C. in *Keegstra*, arguably contradicts or largely ignores the earlier ruling of the Supreme Court in *R.* v. *Big M Drug Mart Ltd.*[111] In *Big M*, the Supreme Court advocated a purposive approach to the interpretation of the rights and freedoms in the *Charter*, whereby the meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of its purpose. That is, it was to be understood in the light of the interests it was meant to protect. The purposive approach allows reference to:

> [T]he character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and

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> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

[110] For criticisms of Dickson C.J.C.'s approach in *Keegstra*, see K. Mahoney, "*R.* v. *Keegstra*: A Rationale for Regulating Pornography?" (1992) 37 McGill L.J. 242 at 247-249, L. Weinrib, "Hate Promotion in a Free and Democratic Society: *R.* v. *Keegstra*" (1991) 36 McGill L.J. 1416 at 1419-1425, and R. Moon, "Drawing Lines in a Culture of Prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C.L. Rev. 99 at 104-113.

[111] *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.) [hereinafter *Big M*].

> purpose of the other specific rights and freedoms, with which it is associated within the text of the *Charter*. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. [In order not to overshoot the purpose of the right or freedom, the *Charter* should] be placed in its proper linguistic, philosophic and historical contexts.[112]

However, in both *Irwin Toy* and *Keegstra*, the Supreme Court defined the freedom of expression, with the exception of violent expression, absolutely.

Since the scope of s.2(b) of the *Charter* is not attenuated by reference to the other *Charter* rights and freedoms, most notably ss.15 and 27, it can be argued that the purposive approach is not being utilized in regard to s.2(b) of the *Charter*. In *Irwin Toy*, the Court held that the values underlying the freedom of expression were the pursuit of truth, participation in the community in social and political decision making, and individual self-fulfillment and human flourishing. The failure of the Court in *Irwin Toy* and *Keegstra* to define free expression as expression which advances the values underlying s.2(b) has been criticized as an affront to the purposive approach.[113] Following these arguments and reading *Big M*, *Irwin Toy*, and *Keegstra* together, it seems the Supreme Court has mandated that all *Charter* rights should be defined using the purposive approach, except the freedom of expression which should be defined almost absolutely. Continuing with this argument, it can be said that by defining the freedom of expression in almost absolute terms, while using the purposive approach to

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[112] *Ibid.* at 344.
[113] K. Mahoney, *supra* note 110 at 247-249.

delineate the appropriate scope of other rights and freedoms in the *Charter*, the Supreme Court has created a hierarchy of *Charter* rights, with the freedom of expression enjoying more protection than all the other *Charter* rights. It can then be said that it is inconsistent to have a hierarchy of *Charter* rights when the Constitution as a whole is the supreme law of Canada.[114] For these reasons, the position can be taken that Dickson C.J.C. did not, but should have, utilized the purposive approach of *Big M* in determining the scope of the s.2(b) freedom.[115]

In response to these arguments, I contend that while the Court in *Irwin Toy* and *Keegstra* did not formally follow the steps of the purposive approach in the order advocated in *Big M*, the purposive approach was substantively applied to the scope of s.2(b) of the *Charter* in these cases. The view espoused by the Supreme Court in *Irwin Toy*, and adopted in *Keegstra*, was that all meaning or content was protected under s.2(b) because the purpose of the entrenchment of the freedom of expression was to ensure that everyone could express themselves no matter how unpopular and distasteful such expression seemed. This protection was considered necessary to ensure that individuals were free to seek the truth, discuss politics, and attain self-fulfillment.[116]

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[114] An author that takes this position is A.R. Regel, "Hate Propaganda: A Reason to Limit Freedom of Speech" (1985), 49 Sask. L. Rev. 303 at 308-309. Also see *Dagenais* v. *Canadian Broadcasting Corp.* (1994), 34 C.R. (4th) 269 at 298 (S.C.C.) [hereinafter *Dagenais*] in which it is stated that "[a] hierarchial approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law."

[115] This position is taken in K. Mahoney, *supra* note 110 at 246-250 and L. Weinrib, *supra* note 110 at 1421.

[116] *Irwin Toy*, *supra* note 1 at 606.

Giving all content of expression constitutional protection helps ensure that this goal is achieved:

> Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of the freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society.[117]

Could the purposive approach be applied to the scope of s.2(b) of the *Charter* without giving all meaning and content constitutional protection? An alternative approach to that taken by the Supreme Court is to only give s.2(b)'s protection to expression deemed important to truth, democracy and self-fulfillment. If this approach were adopted, only expression that the Court concluded was valuable would be considered to come within the ambit of s.2(b). Expression deemed to fall within this protective ambit would, in essence, require the court's stamp of approval as to content, and courts would be very unwilling to give their stamp of approval to unpopular expression. This approach, whereby the court would have to positively endorse every type of expression which is to be given constitutional protection, would be too restrictive to ensure the protection of all expression deserving preservation.

Another alternative to the approach taken by the Supreme Court of Canada would be for the courts to select categories of expression that are not worthy of protection and to then exclude these categories of expression from the ambit of

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[117] *Keegstra*, *supra* note 16 at 245.

s.2(b).[118] These excluded categories would have to be narrow to catch only expression which is in no circumstances legitimate. If a broad category of expression was selected for exclusion from the protection of s.2(b), much expression strongly linked to the values underlying freedom of expression would be denied constitutional protection. A broad category of expression that illustrates this point is commercial expression. Some types of commercial expression are designed only to increase profits, others are primarily concerned with consumer information, and still others have both profit motive and consumer information as goals. While commercial expression which is in some way harmful, and is primarily motivated by the desire for profit (e.g., communications regarding an economic transaction of sex for money),[119] may not be deserving of constitutional protection, commercial expression that is not harmful and contains a

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[118] This was the approach taken by the Ontario Court of Appeal in *R.* v. *Zundel* (1987), 58 O.R. (2d) 129 (Ont. C.A.). In this case the Court dealt with the offence of spreading false news, now contained in s.181 of the *Code*. The Court stated:

> The nub of the offence in s.177 [now s.181] is the wilful publication of assertions of fact or facts which are false to the knowledge of the person who publishes them, and which cause or are likely to cause injury or mischief to a public interest. It is difficult to see how such conduct could fall within any of the . . . expressed rationales for guaranteeing freedom of expression. Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid in the working of parliamentary democracy or further self-fulfillment. In our opinion an offence falling within the ambit of s.177 [now s.181] lies within the permissibly regulated area which is not constitutionally protected. It does not come within the residue which comprises freedom of expression guaranteed by s.2(b) of the *Charter*. (*R.* v. *Zundel* (1987), 58 O.R. (2d) 129 at 155-156 (Ont. C.A.).)

[119] See, for example, *Reference re ss.193 and 195.1(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter the *Prostitution Reference*].

strong informational component (e.g., professional advertising)[120] deserves to reside within the scope of s.2(b). Such commercial expression enables individuals to make informed economic choices which forms an important part of individual self-fulfillment and personal autonomy.

However, an approach which excludes narrow categories of expression from the ambit of s.2(b) has drawbacks compared with the approach adopted by the Supreme Court of Canada in *Irwin Toy* and *Keegstra*. By excluding narrow categories of expression from the ambit of s.2(b), the Supreme Court would provide very little guidance to lower courts and citizens. For example, by excluding expression regarding an economic transaction of sex for money from s.2(b)'s scope, all the Court would be deciding is that a narrow category of commercial expression is not given constitutional protection. Such decisions would not determine whether other types of commercial expression would be excluded from the scope of s.2(b). Moreover, there might well be a legitimate need to regulate broader categories of expression. For example, it may be desirable to regulate some aspects of professional advertising so as to preserve the integrity and dignity of professions, while simultaneously maintaining judicial checks to prevent any undue infringement upon the freedom of expression of professionals. It might be legitimate to prohibit lawyers from advertising on bus stop benches. This would help to preserve professional dignity, and would not prevent lawyers from using

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[120] See, for example, *Rocket* v. *Royal College of Dental Surgeons of Ontario* (1990), 71 D.L.R. (4th) 68 (S.C.C.).

other means to inform potential clients about their services. A court employing the *Irwin Toy* approach would quickly conclude that the prohibition on bus stop advertising infringes free expression, and would go on to consider all relevant factors including the type of expression regulated (a lawyer's ad), the reason for the regulation, the nature of the regulation, and the resulting extent of infringement of free expression (ads on bus stops are prohibited, but the same information can be made available in different forms).

One advantage of the approach to s.2(b) advocated in *Irwin Toy* and *Keegstra*, is that it provides a consistent analysis. The same approach is used whether one is dealing with a law that prohibits a narrow category of expression that has no or very little connection to the values underlying s.2(b), or regulates a broader category of expression that has a greater connection to those values. There is no need to force cases and laws into a potentially arbitrary classification. All relevant matters are examined by the court under s.1 of the *Charter*, which is well suited to a fully contextualized consideration of the case.[121]

There are other concerns surrounding an approach which excludes certain categories of expression from s.2(b) of the *Charter*. Matsuda, in the context of American constitutional law, argues for a narrow definition of racist hate propaganda that should not be accorded constitutional protection at all.[122] She believes that hate

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[121] J. Ross, "Nude Dancing and the *Charter*" (1994) 1 Rev. Constit. Studies 298 at 320.
[122] M.J. Matsuda, *supra* note 11 at 35-46.

propaganda whose message is of racial inferiority, that is directed against an historically oppressed group and that is persecutory, hateful, and degrading is expression that is so dangerous and tied to violence that it is properly treated as outside the realm of protected discourse.[123] The expression engaged in by Keegstra would fall within Matsuda's narrow definition of unprotected hate propaganda. If the Court had chosen an approach like Matusda's, hate propaganda would not enjoy the protection of s.2(b) of the *Charter*.

There are, however, problems with translating Matsuda's approach to the Canadian context. One such problem can be demonstrated by an examination of the Supreme Court of Canada's judgment in *Ross* v. *New Brunswick School District No.15*.[124] This case also dealt with hate propaganda, but in a human rights context. For a number of years, Malcolm Ross, a teacher, publicly made racist and discriminatory remarks against Jews during his off-duty time through television appearances and published works. Ross argued that Western Christian civilization was being undermined and corrupted by an international Jewish conspiracy. A passage from one of Ross's letters to a New Brunswick newspaper succinctly summarizes his perspective: "My whole purpose in writing and publishing is to exult Jesus Christ and to inform Christians about the great Satanic movement which is trying to destroy our

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[123] *Ibid.* at 35-36.
[124] *Ross* v. *New Brunswick School District No.15*, [1996] S.C.J. No. 40 (QL) [hereinafter *Ross*].

Christian faith and civilization."[125] A Human Rights Board of Inquiry found that Ross's off-duty comments established a poisoned educational environment characterized by a lack of equality and tolerance. The Board concluded that given the high degree of publicity surrounding Ross's publications, it would be reasonable to conclude that his writings were a factor encouraging at least some non-Jewish students to subject Jewish students to anti-Jewish remarks and actions. The Board of Inquiry further found that the School Board, by failing to discipline Ross meaningfully, endorsed his off-duty activities. As a result, the School Board compromised its ability to provide discrimination free educational services, contrary to s.5 of the *Human Rights Act*, R.S.N.B. 1973, c.H-11. To remedy the situation, the Board of Inquiry, in clause 2 of its order, directed the School Board to: (a) place Ross on a leave of absence without pay for 18 months, (b) appoint him to a non-teaching position, if one became available during that period, (c) terminate his employment at the end of that period if, in the interim, he had not been offered and accepted a non-teaching position; and (d) terminate his employment with the School Board immediately if he published or wrote anti-Semitic materials or sold his previous publications during the leave of absence period or at any time during his employment in a non-teaching position.[126]

Ross appealed the constitutionality of clause 2(a), (b), (c), and (d) of the Board of Inquiry's order to the Supreme Court. The Court found that the Board of Inquiry's

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[125] P.T. Clarke, "Public School Teachers and Racist Speech: Why the In-Class / Out of Class Distinction Is Not Valid" (1995), 6 E.L.J. 1 at 8.
[126] *Ross*, *supra* note 124 at 23-27.

order infringed Ross's freedom of expression and religion. However, clause 2(a), (b) and (c) were upheld as reasonable limits under s.1 of the *Charter*. The Court agreed with the Board of Inquiry that Ross had to be moved out of his teaching position because as a teacher he occupied a position of great influence and it was felt that his presence contributed to a discriminatory educational environment. Thus, clauses 2(a), (b) and (c) of the order which dealt with Ross's removal from the classroom were justified under s.1 of the *Charter*.[127] The Court also agreed with the Board of Inquiry that Ross's presence in a non-teaching position would not compromise the ability of the School Board to create a discrimination free learning environment. Therefore, the permanent ban imposed by clause 2(d) was found to be an infringement of freedom of expression that was more intrusive than necessary in order to solve the problem, and, as a result, clause 2(d) of the Board of Inquiry's order was held not to be justified under s.1 of the *Charter*.[128]

Ross's expression would fall into Matsuda's narrow definition of hate propaganda. If extreme hate propaganda like Ross's were excluded from the ambit of s.2(b), clause 2(d) of the Board of Inquiry's order would have been valid. Many people might argue that it would be a good thing if clause 2(d) of the Board of Inquiry's order was upheld, as Ross's anti-Semitic publications harm the community, particularly that segment of the community who are Jewish.

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[127] *Ibid.* at 109.
[128] *Ibid.* at 111.

For those who believe that Ross should be prosecuted under s.319(2) of the *Code* if he were to engage in the acts proscribed by clause 2(d), and that therefore clause 2(d) serves a valid purpose, it should be noted that even a criminal conviction under s.319(2) would not automatically lead to Ross's employment with the School Board being terminated. Ross could be given a fine as a sentence for a conviction under s.319(2) and be able to resume work the day after his sentencing. Consequently, upholding clause 2(d) of the Board of Inquiry's order could mean imposing a harsher consequence upon Ross than a criminal conviction under s.319(2) might entail.

Thus, a concern with the categorical approach to freedom of expression is that even regarding the narrow category of hateful expression that Matsuda wants to exclude, some regulation is too extreme. There is some link, however tenuous, between such expression and the values underlying freedom of expression. Hate propagandists like Ross enjoy a measure of personal fulfillment from their speech. When society punishes them, they are being punished for their ideas and their individuality. Society is prepared to do this to some extent, because of the harm their expression entails, but we should not go further than reasonably necessary to solve the problems caused by this expression. Only the approach to the scope of s.2(b) advocated in *Irwin Toy* and *Keegstra* can ensure that an individual's freedom of expression is not infringed more than is required.

Still, there is the argument that had the Court gone through each step of the purposive approach as laid out in *Big M*, the scope of s.2(b) would have to have been

attenuated by reference to ss.15 and 27 of the *Charter*. In rejecting the argument that the scope of s.2(b) should be attenuated by s.15, McLachlin J. acknowledged that, where possible, the provisions of a statute should be read together to avoid conflict.[129] However she did not agree that ss.15 and 2(b) were brought into conflict in *Keegstra* because, in her view, s.15 (and the *Charter* as a whole) is not something which compels state action but, instead, is something which bars state action.[130] Since there was no law or state action which infringed equality in *Keegstra*, s.15 was not directly engaged and there was no conflict between rights. Consequently, McLachlin J. chose not to read ss.15 and 2(b) together in order to attenuate the scope of s.2(b).[131]

The stronger argument for attenuation of the scope of s.2(b) by reference to other *Charter* rights comes from s.27. As may be recalled from Chapter One, section 27 of the *Charter* states that the *Charter* should be interpreted in accordance with the policy of multiculturalism. Thus, it can be argued that the scope of s.2(b) should be attenuated by s.27 of the *Charter*, thereby leading to the exclusion of hate propaganda

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[129] *Ibid.* at 238.

[130] McLachlin J. asserted this as a general rule and, as a general rule, it is correct. There are, however, exceptions. For example, in *R.* v. *Stinchcombe* [1991] 3 S.C.R. 326 (S.C.C.), the Court held that s.7 of the *Charter* which states: "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." compels the state to disclose, to an accused, virtually all information relevant to the conduct of his/her defence, including witness statements.

[131] Although Dickson C.J.C. also rejected the argument that the scope of s.2(b) would have to be attenuated by reference to ss.15 and 27 of the *Charter*, instead of providing detailed reasoning for his conclusion he stated that this result flowed from the Court's decision in *Irwin Toy* (*Keegstra, supra* note 16 at 160-161).

from the protected ambit of s.2(b). However, s.27 does not explicitly indicate which part of the *Charter* must be interpreted in accordance with the policy of multiculturalism. Because of this, the argument can be made that if s.27 influences the s.1 analysis of an impugned law, s.1 also being part of the *Charter*, the Court is using s.27 correctly. And this is exactly how the Court utilized s.27 in *Keegstra*.[132]

The next criticism leveled at the Court's approach in *Keegstra* is that by defining the scope of freedom of expression broadly while leaving the purposive

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[132] One of the distinguishing features of s.27 of the *Charter* is the paucity of jurisprudence surrounding it. (V.W. DaRe, "Beyond General Pronouncements: A Judicial Approach to Section 27 of the *Charter* [forthcoming?]" (June 1995) 33 Alta. L. Rev. 551 at 552.) However, there are cases, other than *Keegstra*, in which s.27 has been used to influence the s.1 analysis of an impugned legislative provision. For example, in *Bell*, s.27 was applied in the s.1 analysis to uphold a provision of the *Saskatechewan Human Rights Code*, S.S. 1979, c.S-24.1. The provision prohibited discriminatory practices and materials which ridiculed or belittled any group because of race or religion. When s.27 has been judicially considered outside of the s.1 analysis, it has been used to broaden, not narrow, the scope of other rights or rules. For instance, in *R.* v. *Fosty*, [1991] 6 W.W.R. 673 (S.C.C.) [hereinafter *Fosty*] the Court used s.27 in conjuction with s.2(a) of the *Charter* (freedom of religion) to uphold a "non-denominational" approach to the exclusion of evidence based on religious communication. As a result, the Court refused to limit the application of the rule to formal confessions made only to ordained priests or ministers, and instead, broader based religious communications were held to be caught within the exclusionary rule's scope. Thus, a Muslim's discussion with an Islamic Mullah, or a Jew with a Rabbi would be excluded under the exclusionary rule pertaining to religious communication. Other examples where s.27 was used to interpret rights more broadly include *Big M* and *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews* v. *LSBC*]. In *Big M*, s.27 was used to interpret s.2(a) of the *Charter*. As a result, s.2(a) was held to protect all religious minorities, including non-Christian ones, from direct or indirect majoritarian coercion. In *Andrews* v. *LSBC*, the Supreme Court used s.27, along with other *Charter* rights, to support the view that s.15 of the *Charter* does not only mandate identical treatment between individuals and groups but also, in some cases, it mandates that certain distinctions between individuals and groups be recognized.

approach, as laid out in *Big M*, to deal with the other *Charter* rights, the Court is setting s.2(b) apart from all the other *Charter* rights, thereby creating a hierarchy of rights.[133] This argument is based on the idea that the purposive approach necessarily requires a narrower definition for *Charter* rights than does the large and liberal approach to the definition of *Charter* rights.

The result in *Big M* creates some doubt about the validity of this assumption, since the use of the purposive approach there led to an absolute definition for the freedom of religion. Section 2(a) of the *Charter* states: "2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion[.]" The Court's definition of freedom of religion in *Big M* was absolute in the sense that all religious expressions and manifestations of belief and non-belief were held to be protected by s.2(a) of the *Charter*.[134] The Court held that freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals, and the fundamental rights and freedoms of others, but these competing rights are to be reconciled under the s.1 analysis formulated in *R.* v. *Oakes*.[135] This approach was adopted by the Supreme Court in *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*,[136] in which the Court refused to put internal limits on the scope of the freedom of religion. Most recently, in *Ross* the Supreme Court unanimously held that

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[133] L. Weinrib, *supra* note 110 at 1424.
[134] *Big M*, *supra* note 111 at 361-362.
[135] *R.* v. *Oakes* [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter *Oakes*].
[136] *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*[1995] 1 S.C.R. 315 (S.C.C.) [hereinafter *B.(R.)*].

the approach adopted by the Court in *B.(R.)* was analytically preferable to putting internal limits on the scope of freedom of religion because the *B.(R.)* approach gives the broadest possible scope to judicial review under the *Charter* and provides a more comprehensive method of assessing the relevant conflicting values. Thus, freedom of expression is not the only *Charter* right to be defined almost absolutely. A broad approach to *Charter* rights may be one that best achieves the purposes of the right, but each right must be considered individually to determine if a particular right requires a broad definition to ensure its purposes are achieved. In the case of freedom of expression and religion, broad approaches best achieve the purposes of the rights, while with other rights this may not be the result.[137] As long as each right is interpreted in accordance with its purposes, a hierarchial approach to *Charter* interpretation is not being mandated. At the very least, what the preceding discussion of s.2(a) of the *Charter* demonstrates is that s.2(b) is not being set apart from all other *Charter* rights.

Another troubling aspect of *Keegstra* is the articulation of the violent expression exception, whereby violent forms of expression were excluded from s.2(b) protection.[138] The Court held that violence did not come within the ambit of s.2(b) but

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[137] For example, s.2(d) of the *Charter* states: "2. Everyone has the following fundamental freedoms: . . . (d) freedom of association." The Supreme Court of Canada has held that the freedom of association gives employees the right to form a trade union but it does not protect their right to strike (*Re Public Service Employees Relations Act* [1987] 1 S.C.R. 313 (S.C.C.)).

[138] Dickson C.J.C. confined this exception to actual violence, so that even threats of violence were protected by s.2(b) (see *Keegstra*, *supra* note 16 at 160). McLachlin J. extended the violent expression exception so that threats of violence were also not protected under s.2(b) (see *Keegstra*, *supra* note 16 at 236-237).

it offered no principled justification for why this was so.[139] Dickson C.J.C. did not exclude violent acts from s.2(b)'s protection because they do not carry a message. On the contrary, he excluded these acts from the protection of s.2(b) even though they may carry a message.

Despite the Court offering no principled justification for excluding violent acts as a form of expression protected by s.2(b) of the *Charter*, the Court continues to maintain a distinction between content and form of expression: all content of expression being protected by s.2(b), while some forms of expression are not. For example, in *Committee for the Commonwealth of Canada* v. *Canada*,[140] Lamer C.J.C., Sopinka and Cory JJ. concurring, held that forms of expression incompatible with the main function of government property will not be protected in that context. (The other four justices in the case came to the same result but for different reasons.) What s.2(b) protects is the expression of all ideas, but what is not protected is every way of communicating those ideas. If one assumes that an individual can express the same message in many different forms, without diminishing the message, and that therefore an individual could pick a form of expression protected by s.2(b) without any adverse consequences to the message, the Court's maintenance of a distinction between content and form of expression could be understood. However, just as language colours the

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[139] K. Mahoney, *supra* note 110 at 247.
[140] *Committee for the Commonwealth of Canada* v. *Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.).

content and meaning of expression,[141] so do other forms of expression. Given the inextricable link between content and form of expression, the Court should have held that s.2(b) protects all content and forms of expression. Thus, violent forms of expression should also be protected by s.2(b) of the *Charter*.

It can be argued that the very nature of violent expression makes it inappropriate to provide it the protection of s.2(b). However, in some cases a strong argument can be made that certain types of violent expression should be constitutionally protected. For instance, in April of 1994, as he was leaving a Chamber of Commerce luncheon, Alberta's Premier, Ralph Klein, was squirted in the face by a youth toting a water pistol.[142] A number of students from a nearby high school had been protesting government cuts to education when this incident occurred. The incident did not result in the youth being charged with assault, but it easily could have.[143] Despite the inappropriateness of his action, a criminal record could be deemed a disproportionately harsh punishment. Assuming that the youth's action was a protest against government cuts to education, and that no physical injury resulted, perhaps it should be protected under s.2(b). If that was the case, any law providing for the criminal prosecution of the youth may not be upheld under s.1 or read down so as not to encompass his action.

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[141] *Ford* v. *Quebec (Attorney General)* (1985), 54 D.L.R. (4th) 577 at 604 (S.C.C.).
[142] "National General News" *Canadian Press 94* (20 April 1994) (QL).
[143] *Ibid.*

One possible reason for the Court to make a violent expression exception to the scope of the freedom of expression is because treating a violent act as a matter of expression gives some legitimacy to acts of violence.[144] But if this is the reason for the violent expression exception, it can be argued that, by not excluding hate propaganda from the ambit of s.2(b) protection, the Court is giving legitimacy to hateful expression and, therefore, hate propaganda should not be included within the scope of s.2(b). If the reason for the violent expression exception is that violent expression infringes upon human dignity and autonomy, it is certainly arguable that as hate propaganda does the same thing, it too should not be given s.2(b) protection.[145] To be consistent, either the Court should have refused to recognize the violent expression exception and allow laws that prohibit expressive violent acts to be justified under s.1, or the Court should not have included hate propaganda as protected expression under s.2(b).

As shown earlier, in order to ensure that a speaker's freedom of expression is never more than minimally infringed, no matter how unpopular or repugnant the content of his speech may be, hate propaganda must be included within the ambit of s.2(b) protection. Therefore, to be logically consistent, the Court should also have included expressive forms of violence within the scope of the freedom of expression. In response to those who feel that giving violent acts protection under s.2(b) gives legitimacy to acts of violence, it must be noted that laws that proscribe violent acts

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[144] R. Moon, *supra* note 110 at 111.
[145] K. Mahoney, *supra* note 110 at 247.

would, in almost all cases, be upheld as reasonable limits to s.2(b) under s.1 of the *Charter*. As a result, such laws would be constitutionally valid and, in the end result, violent acts would not be protected by the *Charter*.

To take the position that, by protecting violent acts and hate propaganda under s.2(b) of the *Charter*, the judiciary would be giving legitimacy to such expression is to take a position that does not fully comprehend the significance of s.1 of the *Charter*. Section 1 is an important part of the *Charter*. As stated by Dickson C.J.C. in *Keegstra*:

> In the words of s.1 are brought together the fundamental values and aspirations of Canadian society. As this Court has said before, the premier article of the *Charter* has a dual function, operating both to activate *Charter* rights and freedoms, and to permit such reasonable limits as a free and democratic society may have occasion to place upon them.[146]

To adopt the view that simply because violent acts and hate propaganda are protected by s.2(b) that they are given legitimacy is to consider only half of the constitutional analysis. For such expression to be constitutionally protected in any tangible sense, laws which proscribe them must fail the s.1 test. Thus, any legitimacy given to violent acts and hate propaganda as protected activity under s.2(b) would be quickly taken away if the laws which proscribe them are upheld under s.1. The strength of this perspective is exemplified by the fact that some legal scholars from outside Canada do not view the *Charter* as an instrument protecting hate propaganda, despite its

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[146] *Keegstra*, *supra* note 16 at 162.

protection under s.2(b).[147] On the contrary, they prefer to view the end result, being that s.319(2) of the *Code* was held to be constitutionally justified under s.1, as the important point. In short, merely providing violent acts and hate propaganda the protection of s.2(b) does not give them legitimacy through constitutional protection. Before they can truly be said to be constitutionally protected, s.1 of the *Charter* must be taken into account. The symbolic value of having violent acts and hate propaganda included within the protective scope of s.2(b) should be negated by the breadth of s.2(b)'s ambit and those who argue otherwise are adopting an abstract, incomplete picture of the *Charter*.

IV. THE SECTION 1 ANALYSIS

A. THE *OAKES* TEST

Before analyzing the Supreme Court's s.1 analysis in *Keegstra*, it is important to review the jurisprudence surrounding s.1 in general. The starting point in examining s.1 jurisprudence is *Oakes*. *Oakes* sets out the basic test to be considered when determining if an impugned law can be upheld under s.1. In essence, the *Oakes* criteria mandate that the legislation in question relate to a pressing and substantial government objective, that the legislation be rationally connected to the objective, that the legislation impair the right as little as possible, and that there be a balance between the extent of the infringement of the right and the importance of the objective. Whether

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[147] See M.J. Matsuda, *supra* note 11 at 21 and I.B. McKenna, *supra* note 56 at 168-170.

this test is performed strictly or deferentially depends on the nature of the legislation and the value of the restricted expression.

B. NATURE OF THE LEGISLATION

It is firmly established that the deference accorded to Parliament or the legislatures when conducting a s.1 analysis of impugned legislation varies with the social context in which the limitation on rights is imposed. In *R.* v. *Edward Books & Art Ltd.*,[148] the Court held that judges were to be cautious when invalidating legislation pursuant to the *Charter* when that legislation's object was the improvement of the condition of vulnerable groups in society. When dealing with legislation of this kind, a more deferential s.1 analysis is to be used.

In *Irwin Toy*, the Court suggested that it was appropriate to apply s.1 with less scrutiny when Parliament or a legislature was mediating between competing claims of different groups in the community. This was held to be especially so when the assessment involved weighing scientific evidence and the allocation of scarce resources.[149] However, in some cases, rather than mediating between different groups, the government can be seen as the singular antagonist of the individual claiming an infringement of *Charter* rights. The paradigmatic example where the government can be seen in this light is the prosecution of crime. In cases where the government can be seen as the singular antagonist of the *Charter* claimant, greater s.1 scrutiny is called

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[148] *R.* v. *Edwards Books & Art Ltd.* (1986), 35 D.L.R. (4th) 1 at 49 (S.C.C.) [hereinafter *Edwards Books*].
[149] *Irwin Toy*, *supra* note 1 at 622-623.

for.[150] Thus, the *Oakes* test must be applied flexibly, having regard to the social context of each case.

C. VALUE OF THE EXPRESSION

In *Edmonton Journal* v. *Alberta (A.-G.)*,[151] Wilson J. noted that not all expression was deserving of the same level of protection. In her view, it was important to assess the importance of the particular exercise of freedom of expression when engaging in the s.1 analysis. Consequently, Wilson J. held that not all infringements of free expression should be held up to the same s.1 level of scrutiny.

This contextual approach to freedom of expression was adopted by a unanimous court in *Rocket* v. *Royal College of Dental Surgeons of Ontario*.[152] In *Rocket*, the Court held that expression that is only tenuously linked to the values underlying freedom of expression will enjoy less s.1 protection.

D. A PRESSING AND SUBSTANTIAL GOVERNMENT OBJECTIVE

Dickson C.J.C. easily found that s.319(2) of the *Code* had a pressing and substantial objective in a free and democratic society. He ascertained that there were essentially two sorts of injury caused by hate propaganda:

> First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence . . . a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's

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[150] *Ibid.* at 626.

[151] *Edmonton Journal* v. *Alberta (A.-G.)* [1990] 1 W.W.R. 577 at 586-587 (S.C.C.) [hereinafter *Edmonton Journal*].

[152] *Rocket* v. *Royal College of Dental Surgeons of Ontario* (1990), 71 D.L.R. (4th) 68 (S.C.C.) [hereinafter *Rocket*].

> sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs . . . The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance . . . A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large . . . It is . . . not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society . . . The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.[153]

The objectives of s.319(2) were held to be the protection of targeted groups and the promotion of societal cohesiveness.

Dickson C.J.C. went on to find that s.319(2)'s objectives were bolstered by factors he dismissed when considering the scope of s.2(b) of the *Charter*. He found that the international human rights obligations taken on by Canada were significant in assessing Parliament's objective under s.1. In addition, he used other provisions of the *Charter*, most notably ss.15 and 27, to indicate the significant strength behind the objectives of s.319(2) of the *Code*.

McLachlin J. also found that s.319(2) of the *Code* had a pressing and substantial objective in a free and democratic society. She agreed with Dickson C.J.C. as to the objectives of s.319(2), but instead of referring to the international human rights obligations taken on by Canada and ss.15 and 27 of the *Charter* to bolster the importance of s.319(2)'s objectives, she relied on a number of Parliamentary reports,

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[153] *Keegstra*, *supra* note 16 at 170-172.

among them the Cohen Report, as providing empirical foundation for the submission that defamation of particular groups is a pressing and substantial concern in Canada.[154]

E. THE RELATIONSHIP OF HATE PROPAGANDA TO THE VALUES UNDERLYING FREEDOM OF EXPRESSION

McLachlin J. thought that s.319(2) of the *Code* constituted a serious infringement of freedom of expression. In her view, s.319(2) caught too much expression within its ambit, and the expression that was caught was too clearly linked to the values underlying freedom of expression. McLachlin J. stated:

> Section 319(2) of the *Criminal Code* does not merely regulate the form or tone of expression - it strikes directly at its content and at the viewpoints of individuals. It strikes, moreover, at viewpoints in widely diverse domains, whether artistic, social or political. It is capable of catching not only statements like those at issue in this case, but works of art and the intemperate statement made in the heart of social controversy . . . In short, the limitation on freedom of expression created by s.319(2) of the *Criminal Code* invokes all of the values upon which s.2(b) of the *Charter* rests - the value of fostering a vibrant and creative society through the marketplace of ideas; the value of the vigorous and open debate essential to democratic government and the preservation of our rights and freedoms; and the value of a society which fosters the self-actualization and freedom of its members.[155]

In applying the proportionality branch of the *Oakes* test, Dickson C.J.C. also examined the relationship of hate propaganda to the values underlying s.2(b) of the *Charter*. Dickson C.J.C. found that the search for truth did not provide convincing support for the protection of hate propaganda:

> [T]he greater the degree of certainty that a statement is erroneous or mend-

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[154] *Keegstra, supra* note 16 at 249-250.
[155] *Keegstra, supra* note 16 at 260-261.

> acious, the less its value in the quest for truth . . . we [should not] overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas. There is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world. To portray such statements as crucial to truth and the betterment of the political and social milieu is therefore misguided.[156]

Dickson C.J.C.'s dismissal of the assumption of rationality supports the constitutionality of s.319(2) of the *Code*, but his reasoning may also serve to undermine the protection of all forms of expression, for "[w]hy should the state allow individuals to determine the truth on any occasion if their judgment is not reliable?"[157] If the Court is to uphold restrictions on hate propaganda without simultaneously undermining its commitment to the freedom of expression, "it must explain why hate propaganda, in contrast to other sorts of expression, does not advance the public acceptance of truth or the development of a capacity in members of the public to know truth."[158] Hate propaganda suppresses reason and discourages conscious reflection because of its history and pervasiveness in Canadian society. As noted by Moon:

> The racist claims of Keegstra are understood and evaluated against this larger background of racist assumptions. This background makes his claims seem plausible and even reasonable or ordinary and it makes them less open to critical evaluation and refutation . . . the social background of bigotry and racial stereotyping . . . makes what otherwise might seem absurd and ridiculous, seem serious and plausible. This background dulls critical reaction, making it easy to accept and difficult to refute decisively . . . The pervasiveness of racial stereotyping makes "more speech" inadequate and makes it fair to place on Keegstra and

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[156] *Keegstra*, *supra* note 16 at 184.
[157] R. Moon, *supra* note 110 at 121.
[158] *Ibid.*

> others some responsibility in law[.][159]

Consequently, although Dickson C.J.C.'s conclusion regarding the tenuous link between hate propaganda and the search for truth seems correct, the failure of the Chief Justice to acknowledge the legacy of racism in Canadian society calls into question his reasoning on this topic.

Dickson C.J.C. also held that the protection of hate propaganda was not bolstered to a great degree by the self-realization rationale behind the freedom of expression. Although he recognized that hate propaganda ostensibly allowed the hatemonger to experience a measure of self-realization by being able to express his or her ideas and sentiments, Dickson C.J.C. also realized that hate propaganda may undermine the self-fulfillment of members of targeted groups. As a result, he concluded that

> self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group. The message put forth by individuals who fall within the ambit of s.319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of the s.2(b) benefit. The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol an intolerance and prejudice which views as execrable the process of individual self-development and human flourishing among all members of society.[160]

Thus, Dickson C.J.C. was cognizant that, to the extent that a member of an identifiable group has been intimidated into silence by expressions of hatred, his/her freedom of

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[159] *Ibid.* at 136 and 138.
[160] *Keegstra, supra* note 16 at 184-185.

expression has been infringed by the purveyors of hate who, ironically, seek to defend their conduct by appeal to freedom of expression.[161]

Finally, the majority examined the link between hate propaganda and the democratic process. Dickson C.J.C. admitted that hate propaganda could be characterized as political speech. However, he also asserted that hate propaganda undermined democratic values by condemning the view that all citizens need to be treated with equal respect and dignity. Dickson C.J.C. saw the expression of hate propaganda as an impediment to full participation for all Canadians in the political sphere. Consequently, he held that hate propaganda was only tenuously linked to the values underlying freedom of expression, and he concluded that restrictions on hate propaganda were easier to justify than other infringements of s.2(b).

F. THE RATIONAL CONNECTION BETWEEN THE LEGISLATION AND ITS OBJECTIVES

In finding that there was a rational connection between the objectives of s.319(2) and its terms, Dickson C.J.C. rejected the argument that hate propaganda laws were ineffective. The fact that hate propaganda laws in Weimar, Germany did not prevent the Holocaust was not considered determinative on the question of the efficacy of such laws. Even H.W. Arthurs, who made a submission against the adoption of hate propaganda offences into the *Code* to the standing Committee on Legal and Constitutional Affairs, Senate of Canada, considers the argument that hate propaganda

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[161] I.B. McKenna, *supra* note 56 at 169.

laws in Weimar, Germany did not prevent the Holocaust and therefore hate propaganda laws in Canada may not contribute to multiculturalism and equality, to be spurious. Arthurs states that

> Canada of 1969 can in no way be compared to Germany of 1919 or even 1929. We have not just come through a catastrophic war, a social and political revolution, an economic collapse, or a sudden class upheaval. We are not a country lacking in democratic traditions, new to parliamentary institutions, or beset by totalitarian subversives of the left and the right. In short, none of the conditions which produced the downfall of the Weimar republic and the rise of the Nazi party are, or are likely to be present in Canada. In factual terms, any comparisons between these two countries . . . must be dismissed out of hand.[162]

It is my opinion that Dickson C.J.C. was correct in his conclusion that "conditions particular to Germany made the rise of Nazi ideology possible despite the existence and use of these [hate propaganda] laws."[163] The Chief Justice thought that a testament to the effectiveness of hate propaganda legislation could be found in the fact that a number of countries, including post-war Germany, continue to have such legislation.

In determining whether s.319(2) of the *Code* was rationally connected to the objectives which it was aimed at promoting, McLachlin J. admitted that the legislation, at least in part, furthered Parliament's intention because a prosecution "for offensive material directed at a particular group may bolster its members' beliefs that they are valued and respected in their community, and that the views of a malicious few do not

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[162] H.W. Arthurs, "Hate Propaganda: An Argument Against Attempts To Stop It By Legislation" (1970), 18 Chitty's L.J. 1 at 3. For an extensive review of the hate propaganda legislation and jurisprudence in the Weimar Republic see C. Levitt, "Racial Incitement and the Law: The Case of the Weimar Republic" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Carswell, 1991) 211.

[163] *Keegstra, supra* note 16 at 189.

reflect those of the population as a whole."[164] Despite these comments, McLachlin J. rejected the argument that s.319(2) was rationally connected to its objectives. Moreover, she did this by relying on doubtful empirical grounds. McLachlin J. thought that s.319(2) was not rationally connected to its objectives because criminalizing racist expression may inadvertently promote racism, instead of suppressing it, by providing greater publicity and exposure for the racist propaganda. Moreover, she noted that "not only does the criminal process confer on the accused publicity for his dubious causes - it may even bring him sympathy."[165]

McLachlin J. recounted that Zundel, prosecuted for the crime of spreading false news,[166] claimed that his prosecution had given him a million dollars worth of publicity. It appears as though McLachlin J. speculated about the possible effects of hate trials because no real empirical evidence was cited by counsel to the Court. The reason that counsel did not cite empirical evidence is unclear because prior to the Court's decision in *Keegstra,* Weimann and Winn had actually carried out a study examining the impact

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[164] *Keegstra, supra* note 16 at 252.

[165] *Ibid.* at 253. It should be noted that in *RJR-MacDonald Inc.* v. *Canada (Attorney General)* (1995), 127 D.L.R. (4th) 1 (S.C.C.) [hereinafter *RJR*], which was decided after *Keegstra*, McLachlin J. seemed to have lowered the requirement needed to find that the rational connection test was met. In *RJR*, she found that this test was met if the evidence suggested it was reasonable or logical that a rational connection existed between the legislation and its objectives (*RJR, supra* note 165 at 98). She applied this lower standard in *RJR* because in that case she was dealing with commercial expression, which she regarded as a category of expression whose limits were easier to justify under s.1 of the *Charter* (*RJR, supra* note 165 at 102-103).

[166] Zundel was prosecuted for publishing Holocaust denial literature. Ernst Zundel's trials and the offence of spreading false new is examined in greater detail in Chapter Three.

of the trial of Ernst Zundel on the public.[167] The research study was based on a national survey of Canadian public responses to the Zundel trial carried out in 1985. Half of the respondents reported that the trial had no effect on their attitudes towards the Jewish population, and, among those who did report a change, the number of respondents who became more sympathetic towards Jews was far greater than the number who became less sympathetic. On the basis of these findings, Weimann and Winn concluded that, despite the publicity given to Zundel via his prosecution, Canadians were not persuaded that the Holocaust was a hoax. Nor did the trial create an increase of anti-Semitic attitudes among the respondents. On the contrary, the trial's impact appeared to have slightly increased respondents' sympathy for the Jewish community. This study is not alone in its finding that hate trials do not encourage the spread of racial hatred or engender sympathy for hatemongers.[168]

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[167] G. Weimann & C. Winn, *Hate on Trial: The Zundel Affair, the Media and Public Opinion in Canada* (Oakville: Mosaic Press, 1986).

[168] For example, there was a study carried out in two California cities in the 1960s in relation to the trial of an alleged war criminal, Adolph Eichmann. Eichmann was captured by Israeli agents in Argentina in 1960 and was tried and convicted as a war criminal in Israel in 1961. It was found that he participated in the torture and murder of millions of Jews under the Nazi regime during World War II. The trial vividly recalled the atrocities of the Holocaust and it received extensive, international media coverage. The majority of respondents tended to accept the prosecution's perception of Eichmann as a "monster" and approved of the trial as an appropriate means of dealing with him. (See C.Y. Glock, G.J. Selznick & J.L. Spaeth, *The Apathetic Majority: A Study Based on Public Responses to the Eichmann Trial* (New York: Harper & Row, 1966.) More recently and perhaps more relevantly, a study was carried out between 1985-1990 in Canada on the effects of the Zundel and Keegstra trials. As in the earlier study mentioned above, respondents in this study tended to endorse the prosecution's negative image of the accused. Moreover, the majority of respondents supported the view that the activities of Zundel and Keegstra were harmful to

G. MINIMAL IMPAIRMENT

(I) ELEMENTS THAT RESTRICT THE SCOPE OF S.319(2)

Dickson C.J.C. found that s.319(2) was not vague or overbroad. Indeed, in his view, s.319(2) was narrowly drawn. One element that restricts the scope of the section is that it does not apply to private communication:

> In assessing the constitutionality of s.319(2), especially as concerns arguments of overbreadth and vagueness, an immediate observation is that statements made "in private conversation" are not included in the criminalized expression . . . the wording of s.319(2) indicates that private conversations taking place in public areas are not prohibited. Moreover, it is reasonable to infer a subjective *mens rea* requirement regarding the type of conversation covered by s.319(2), an inference supported by the definition of "private communications" contained in s.183 of the *Criminal Code*. Consequently, a conversation or communication intended to be private does not satisfy the requirements of the provision if through accident or negligence an individual's expression of hatred for an identifiable group is made public.[169]

The fact that s.319(2) prohibits public communication, as opposed to private communication, makes it easier to justify under s.1.

A second feature that narrows the ambit of s.319(2) is the use of the word "wilfully," and the restriction thus brought to s.319(2) by virtue of the decision in *R.* v. *Buzzanga*.[170] *Buzzanga* was the first reported case in which what is now s.319(2) of the *Code* was interpreted. The accused, Buzzanga and Durocher, were two Franco-Ontarians who distributed virulently anti-French Canadian handbills. Both Buzzanga

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Canadians. The Canadian study showed that the trials did not serve to incite hatred towards Jews or to increase anti-Semitic feelings among non-Jews. (See E. Kallen, *supra* note 97 at 46-73.)

[169] *Keegstra, supra* note 16 at 191-192.

[170] *R.* v. *Buzzanga* (1979), 25 O.R. (2d) 705 (Ont. C.A.) [hereinafter *Buzzanga*].

and Durocher testified at their trial that they did not have the intention to raise hatred towards anyone. Their professed intention was to motivate the French Canadians of Essex County to compel the school board to build a French language secondary school. Despite the trial judge never stating that he disbelieved the accused, they were convicted of wilfully promoting hatred against the French Canadians of Essex County, a group to which they themselves belonged. The accused appealed their convictions to the Ontario Court of Appeal. The Court of Appeal held that the word "wilfully" in what is now s.319(2) of the *Code* mandated a mental element of the offence that was only satisfied when an accused subjectively desired the promotion of hatred or foresaw such a consequence as certain, or substantially certain, to result from an act done to achieve some other purpose.[171] Thus, the reckless or negligent promotion of hatred would not suffice for a conviction under s.319(2). Because the evidence of the accused, if believed, would not have invariably led to the conclusion that they intentionally promoted hatred against the French speaking community of Essex County, the appeal was allowed and a new trial was ordered. Subsequently, the Crown exercised its discretion and withdrew the charges against the accused.

In *Keegstra,* Dickson C.J.C. also held that the term "promotes" implied active support or instigation, while the term "hatred" connoted an extreme emotion that was associated with vilification and detestation.[172] Thus, "hatred" does not denote a wide

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[171] *Ibid.* at 721.

[172] *Keegstra, supra* note 16 at 194 and 195.

range of diverse emotions but is restricted to the most intense form of dislike. The last constricting feature of s.319(2), which Dickson C.J.C. remarked upon, were the defences set out in s.319(3)(b)-(d). He found that these defences demonstrated expressive activity which generally did not fall within the wilful promotion of hatred. These defences, Dickson C.J.C. held, were an attempt to minimally impair the s.2(b) freedom.

Under the minimal impairment portion of the *Oakes* test, McLachlin J. found that s.319(2) was overbroad, in that it may catch within its ambit much expression that should be protected. McLachlin J. interpreted s.319(2), and particularly the term "hatred," more broadly than Dickson C.J.C. She held that the word "hatred" was capable of denoting a wide range of emotion from active dislike to detestation. Moreover, she noted that:

> "Hatred" is proved by inference - the inference of the jury or the judge who sits as trier of fact - and inferences are more likely to be drawn when the speech is unpopular. The subjective and emotional nature of the concept of promoting hatred compounds the difficulty of ensuring that only cases meriting prosecution are pursued, and that only those whose conduct is calculated to dissolve the social bonds of society are convicted.[173]

McLachlin J.'s broad interpretation of the term "hatred" was one factor that led to her finding that s.319(2) was unconstitutional, while Dickson C.J.C.'s narrow interpretation of that same term led him to conclude that it withstood constitutional scrutiny. McLachlin J. held that s.319(2)'s overbreadth may create a "chilling effect" on

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[173] *Keegstra*, *supra* note 16 at 256.

legitimate expression. A "chilling effect" refers to a situation in which a law deters speech not within its intended effect. As proof that s.319(2) was overbroad and created this chilling effect, McLachlin J. pointed to some examples where imprudent prosecutions under s.319(2) were called for or instituted. None of the examples she recited resulted in convictions under s.319(2). Of the incidents she recounted, only one involved the laying of charges. That incident occurred in the mid-1970s when some young people were arrested for distributing literature at the Shriners' parade in Toronto.[174] Their pamphlets bore the words, "Yankee go home." Although the young people were charged and even spent a couple of days in jail, the Crown prosecutor subsequently withdrew the charges. In my opinion this incident, and the others mentioned by McLachlin J., illustrate state actions that cannot be lawfully taken under s.319(2). Seen in this light, these incidents do not demonstrate the overbreadth of s.319(2) but are merely examples of illegal police action. A good analogy is provided by the law of search and seizure. In 1983, the Law Reform Commission found that only 39.4% of search warrants obtained were validly issued.[175] This finding did not lead the Law Reform Commission to question the breadth of the statutory provisions authorizing search warrants but, rather, the Law Reform Commission questioned the resolve of law enforcement officials to act within the confines of the statute. In the

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[174] The other examples cited by McLachlin J. involve Leon Uris' pro-Zionist novel, *The Haj*, Salman Rushdie's *Satanic Verses*, and a film entitled *Nelson Mandela* (*Keegstra, supra* note 16 at 257-258).

same way, it is my view that the fact that the authorities have acted imprudently and invoked s.319(2) when it should not have been invoked is, perhaps, not a reflection on the statute but on the resolve of law enforcement officials to act within its confines.[176]

In contrast, it may be argued that unauthorized official action and the self-censorship that could occur as a result of fear of such action inhibit free expression in an important way. Thus far, Canadian courts have not invalidated legislation because of a chilling effect.[177] If the courts are going to continue to take this approach, the concerns raised by possible chilling effects need to be addressed in some other way. One way to address the chilling effect of legislation is for courts to make declarations

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[175] Law Reform Commission of Canada, *Police Powers - Search and Seizure in Criminal Law Enforcement* [Working Paper 30] (Ottawa: Supply and Services, 1983) at 84.

[176] See, for example, *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)* (1996), 131 D.L.R. (4th) 486 (B.C.S.C.) [hereinafter *Little Sisters*]. In *Little Sisters*, the British Columbia Supreme Court dealt with customs legislation authorizing the inspection and seizure of materials deemed to be obscene. The Court found that between 20-30% of the prohibition determinations made by customs officers regarding titles destined to the Little Sisters Book and Art Emporium were incorrect (*Little Sisters*, *supra* note 176 at 516). However, the Court found that the fault lay not with the legislation but with its administration (*Little Sisters*, *supra* note 176 at 536). The Court ruled that "the faulty application of the law by statutory delegates has no s.52(1) constitutional implications." (*Little Sisters*, *supra* note 176 at 540.)

[177] See, for example, *Hill* v. *Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 and *Corp. of Canadian Civil Liberties Assn.* v. *Canada (Attorney General)*, [1992] O.J. No. 566 (QL). The only case where the Supreme Court of Canada has recognized the chilling effect of legislation was in *Rocket*. In *Rocket*, the Supreme Court relied on the chilling effect of legislation to determine the remedy that should be granted after the legislation was found to be unconstitutional (*Rocket*, *supra* note 152 at 82-84). However, the chilling effect of the legislation played no part in determining its constitutionality.

that officials have acted in a manner not authorized by the legislation.[178] Judicial declarations of improper official conduct can serve to educate officials (and others) about the proper scope of the legislation. Such declarations may motivate officials to change their practice in accord with the true ambit of the law. Thus, the most appropriate manner in which to deal with a statute's chilling effect is through better enforcement of the law and more education concerning the scope of the law.

In assessing whether s.319(2) unduly interferes with legitimate expression, the narrow construction of the section offered by Dickson C.J.C. should be kept in mind. Moreover, it is important to recognize that in every constitutional doctrine devised there is a danger of misuse. The question becomes for fear of falling do we refuse to take the first step?[179] Given the strong argument, outlined in Chapter One, that racism remains a serious problem in Canada, I take the position that the step must be taken - expressions of racial hatred must be prohibited by law.

(II) HUMAN RIGHTS LEGISLATION AND THE MINIMAL IMPAIRMENT TEST

Perhaps the strongest argument under the minimal impairment branch of *Oakes* was the argument that human rights legislation could effectively combat racist expression while being less intrusive on individual rights than criminal law. The Chief Justice took the position that Parliament was not limited to only one of either criminal

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[178] This was the approach of the Court in *Little Sisters*.
[179] M.J. Matsuda, *supra* note 11 at 50.

or human rights law, and that occasional condemnation through the force of criminal law was necessary.

Even before the *Charter* was proclaimed, the use of criminal law to proscribe racist expression was controversial because of the limits such laws place on freedom of expression. The powerful consequences a criminal conviction can entail for an individual makes the use of criminal law to proscribe racist expression even more controversial. Not only does a criminal conviction permit the possibility of incarceration for the individual; it also impedes his or her access to certain kinds of employment, diminishes his or her ability to travel to other nations and even, in some cases, eliminates his or her right to remain in Canada. Because of the severe consequences attendant upon a criminal conviction, some people urge that the appropriate manner in which to deal with racist invective is not criminal law but human rights legislation.[180]

In *Keegstra* it was clear that McLachlin J. held this view. She held that human rights legislation impairs the s.2(b) freedom more minimally than does the imposition of criminal sanctions. She noted that a person convicted under s.319(2) faces imprisonment for up to two years. What she did not take note of was that the maximum term of imprisonment that anyone had been sentenced to, upon being convicted under s.319(2), was twelve months, and that sentence was reduced on

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[180] See, for example, A.A. Borovoy, "How Not To Fight Racial Hatred" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Carswell, 1991) 243 at 247, and H.W. Arthurs, *supra* note 162 at 5.

appeal. Keegstra himself only received a fine upon his conviction. Meanwhile, John Ross Taylor was sentenced to a one year prison term for contempt of a human rights tribunal order requiring him to cease and desist from transmitting hateful messages about Jews by telephone.[181] In *Ross*, the Supreme Court, under human rights legislation, barred a teacher from the classroom for publicly expressing anti-Semitic views, even though he never expressed those views in the classroom. Given these examples of the use of human rights legislation, it is not clear that it acts as a more minimal imposition on s.2(b) of the *Charter* than does s.319(2) of the *Code*.

In addition, some authors believe that human rights legislation has a limited scope in proscribing hate propaganda. The argument that is used is as follows: Most human rights legislation is restricted to matters of housing, education, employment and access to public facilities. If human rights legislation were to go beyond particular acts of discrimination to regulating speech in general, such provincial statutes may intrude upon Parliament's exclusive jurisdiction over criminal law. Such provincial statutes would be *ultra vires*.[182] However, there are some decisions indicating that such legislation would not be *ultra vires*. For example, in *Kane* v. *Church of Jesus Christ Christian-Aryan Nations*,[183] the Board of Inquiry held that human rights legislation that prohibited hate speech in general was valid because, by reinforcing prejudice or

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[181] *R.* v. *Taylor* (1990), 75 D.L.R. (4th) 577 at 583 (S.C.C.) [hereinafter *Taylor*].
[182] For support for this argument see K. Dubick, *supra* note 26 at 150-151.
[183] *Kane* v. *Church of Jesus Christ Christian-Aryan Nations* (28 February 1992) at 76 (Alta. Bd. of Inquiry) [hereinafter *Aryan Nations*].

promoting latent discrimination, such expression endangered the rights of the targeted groups to obtain equal opportunities in employment, housing and public accomodation.[184] The issue of whether human rights legislation which regulates speech in general is *ultra vires* has yet to be decided by the Supreme Court of Canada.

Even if human rights legislation is less intrusive on s.2(b) than criminal proscription of hate propaganda, and human rights legislation can validly extend beyond particular acts of discrimination to regulating speech in general, there is still a vital role that only criminal law can play in dealing with hate propaganda. What is this role? Why should racist expression be proscribed by criminal law? John Turner, the Minister of Justice, was asked these same questions. His response was that,

> [the law] tends within the conduct that is prescribed to articulate the values by which we Canadians seek to live. The criminal law is not merely a sanction or control process. It is reflective and declaratory of the moral sense of a community and the total integrity of the community. It seeks not merely to proscribe but to educate. It seeks to set forth a threshold of tolerance and standards of minimum order and decency.[185]

By including an act within the *Code*'s proscriptions, Parliament cannot more strongly condemn the act.

The Cohen Report suggested that the criminalization of hateful expression would have a three-fold educative effect. First, it would establish a restraint on hate communicators by strengthening a social climate unconducive to hate messages.

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[184] Also see *Saskatchewan (Human Rights Commission)* v. *Engineering Students' Society* (1989), 56 D.L.R. (4th) 604 (Sask. C.A.) for support for this proposition.
[185] *House of Commons Debates* (17 November 1963) at 885.

Second, it would reinforce and create an understanding of what is not acceptable to society. The hate communicator would then be seen as operating outside the limits of acceptability. Third, being the most serious and costly mechanism government can employ, it would reassure minority groups that they are supported by the majority of the society in which they live.

Dickson C.J.C. used the educative effect of criminal law to demonstrate that s.319(2) of the *Code* minimally impaired the s.2(b) freedom.[186] However, he did not

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[186] Dickson C.J.C. stated as follows:

> In assessing the proportionality of a legislative enactment to a valid government objective, however, s.1 should not operate in every instance so as to force the government to rely upon the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone, or as part of a larger program of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s.1 aim. (*Keegstra*, *supra* note 16 at 200.)

Dickson C.J.C.'s conclusion that the minimal impairment requirement does not impose an obligation on government to employ the least intrusive measures available, but rather that it requires that the measures employed be the least intrusive in light of both the legislative objective and the infringed right, is an example of the Court using the contextual approach to s.1. Because the nature of s.319(2) was legislation whose object was the improvement of the condition of vulnerable groups in society and because hate propaganda is only tenuously connected to the values underlying freedom of expression, Dickson C.J.C. held that

> [t]hough the fostering of tolerant attitudes among Canadians will best be achieved through a combination of diverse measures, the harm done through hate propaganda may require that especially stringent responses be taken to suppress and prohibit a modicum of expressive activity. At the moment, for example, the state has the option of responding to hate propaganda by acting under either the *Criminal Code* or human rights provisions . . . To send out a strong measure of condemnation, both

suggest that criminal law, exclusively, should be used to combat racist speech. Although there is an important symbolic value in having criminal laws prohibiting the dissemination of hate propaganda, and in prosecuting those that engage in racist expression under those laws, human rights legislation also has a role to play in the proscription of hate propaganda.

What is this role? In many hate propaganda cases, human rights legislation should be used simultaneously with criminal legislation because the human rights process can achieve results that the criminal process cannot. For instance, a criminal conviction under s.319(2) would not automatically take a hate proselytizing teacher out of the classroom, as it is possible that he or she would receive a noncustodial sentence. Even Keegstra, whose expressions of racial hatred took place in the classroom, never received custodial sentences for his s.319(2) convictions. It is within the discretion of school boards to determine whether or not to terminate a teacher's employment. Prior to criminal charges being laid against Keegstra, the school board that employed Keegstra exercised its discretion so as to terminate his employment with them because

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> reinforcing the values underlying s.319(2) and deterring the few individuals who would harm target group members and the larger community by intentionally communicating hate propaganda, will occasionally require use of the criminal law. (*Keegstra*, *supra* note 16 at 200-201.)

Clearly Dickson C.J.C. thought that criminal law's educative effect was so much stronger than that of human rights legislation that the criminal proscription of hate propaganda was not a redundant legislative measure and was, in fact, necessary to protect targeted groups and promote societal cohesion.

he refused to follow the prescribed educational curriculum.[187] However *Ross* demonstrates that a school board might decide not to terminate a teacher who is disseminating hate propaganda. Where a school board is not sufficiently protective of the learning environment of its schools, and retains a teacher who preaches racial hatred, whether on duty or off duty, only the human rights process can be invoked to ensure that teacher's removal from the classroom. Thus, if the school board that employed Keegstra had not terminated his employment with them, a laudable approach would have been to pursue criminal charges against Keegstra to demonstrate society's profound denounciation of his dissemination of hate propaganda, and to engage the human rights process to prevent Keegstra from continuing to poison the learning environment of the students in his school.

Moreover, while the hate propaganda sections of the *Code* are reactive, human rights legislation is often-times pro-active. For example, members of a white supramacist group who conduct a cross-burning ceremony coupled with hate speech, all of which is within public view and earshot, may be charged and convicted under s.319(2), but it is beyond the Court's power to prohibit similar displays into the indefinite future. However, a human rights tribunal may be able to make such an order.[188]

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[187] *Keegstra* v. *Lacombe (Board of Education No. 14)* (1983), 25 Alta. L.R. (2d) 370 at 374 (Bd. of Ref.).

[188] For an example where a human rights tribunal made such order, see *Aryan Nations*, *supra* note 183 at 111. The tribunal made this order pursuant to its statutory power to issue cease and desist orders. The tribunal questioned Terry Long, one of the

At times, the human rights process should be used instead of the criminal process because criminal trials have higher standards of proof than human rights inquiries. The standard of proof in a human rights inquiry is proof on a balance of probabilities, while the criminal burden of proof is proof beyond a reasonable doubt. Because of the more exacting standard of proof required by criminal law, the success of a criminal prosecution is made more difficult than is a finding of discrimination under the human rights process. A concern arising out of this difficulty is that an acquittal in a criminal hate propaganda trial may lend some validity to the hate message.[189] In those cases where the evidence is not likely to meet the high criminal burden, only the human rights process should be invoked so as to avoid this possibility.

While an intent to discriminate is not a prerequisite to invoking the power of a human rights commission,[190] it is a prerequisite for a criminal prosecution. For this reason, many cases of hate propaganda can only be dealt with by way of human rights legislation. For example, it is quite conceivable that a restaurant owner whose

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respondents, about the membership of the Church of Jesus Christ Christian-Aryan Nations, and he was evasive and uncooperative. Mr. Long disappeared before the resolution of the hearing so the membership of the Church was not established. The tribunal needed this information in order to effectively enforce its cease and desist order as the tribunal's order called for all members of the Church to cease discriminatory public displays. This order may be difficult to enforce as the membership of the Church is unknown. Moreover, the tribunal's actions in this case may be subject to *Charter* challenges because asking Mr. Long questions about the membership of the Church and forcing him to answer these questions could be argued to infringe his freedom of expression and association.

[189] B.P. Elman, "Combatting Racist Speech: The Canadian Experience" (Aug. 1994) 32 Alta. L. Rev. 623 at 664-665.

[190] *Taylor*, *supra* note 181 at 603.

restaurant specializes in serving a certain type of ethnic cuisine, could, without meaning to offend anyone, or even forseeing that such a risk was present, use as the title of his restaurant, a commonly known racial slur referring to the ethnic group whose cuisine his restaurant prepares.[191] As there is no intent to discriminate on the part of the

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[191] Such a scenario occurred in the case of *The Ukrainian Canadian Professional and Business Association of Vancouver* v. *William Konyk and the Winnipeg Garlic Sausage Co. Ltd.* (1983), 4 C.H.R.R. D/1653 (B.C.S.C.) [hereinafter *Konyk*]. In this case, the British Columbia Human Rights Commission held that the *British Columbia Human Rights Act*, S.B.C., 1984, c.22 as am. [hereinafter B.C. Hum. Rts. Act] was not violated when the defendant called his restaurant, "Hunky Bill's". The B.C. Hum. Rts. Act only applied to notices which indicate an intention to discriminate "in any manner prohibited by the Act" (s.2(1) B.C. Hum. Rts. Act). Although the Commission examined evidence that the term "hunky" had a pejorative connotation which was extremely offensive to many people, it held that the term did not "objectively" constitute discrimination. Given the evidence before the Commission that such epithets are offensive and engender discrimination in other activities, it is inappropriate to dismiss them as creating only a "subjective" perception of discrimination (W.S. Tarnopolsky, *Discrimination and the Law* (Toronto: Carswell, 1994) at 10-8). The Commission also dismissed the complaint because the evidence did not indicate that there was discrimination in the provision of a service or facility. Thus, there was no "intention to discriminate." Aside from the fact that the B.C. legislation only prohibited notices expressing an "intention to discriminate" instead of also prohibiting notices "indicating discrimination," there seems to be no reason why this sign should have been treated any differently than the sign in *Singer* v. *Iwasyk and Pennywise Foods Limited* (5 November 1976), No. F-73-49 (Sask. Hum. Rts. Comm.) [hereinafter *Singer*]. In *Singer*, Iwasyk operated a drive-in restaurant called "Sambo's Pepperpot" which displayed a sign showing a cariacture of a small person, with black or brown skin color, wearing a chef's hat and a grass skirt and bearing the words "Sambo's Pepperpot." The Saskatchewan legislation applied to notices which "indicates discrimination or an intention to discriminate" (section 4(1) of the *Fair Accomodation Practices Act*, R.S.S. 1965, c.379 which preceded the *Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1, s.14). Thus, the legislation was not drafted as restrictively as the B.C. Hum. Rts. Act. The Commission reached the conclusion that the caricature was negative in its connotations and that non-white minority groups would feel demeaned and belittled by it. The evidence did not indicate that Iwasyk intended to discriminate with respect to service in the restaurant, therefore, the notice did not constitute an "intention to discriminate." However, the Commission held that the sign indicated discrimination:

restaurant owner, a criminal prosecution under s.319(2) would be unsuccessful. Such a case lends itself to be resolved through the intervention of a human rights commission.

Unfortunately, as is discussed in Chapter Four, there has been an overreliance on human rights legislation to combat hate propaganda. Human rights legislation is being used to the exclusion of the criminal law, even in serious cases of hate propaganda where the evidence may sustain a criminal conviction. The use of human rights legislation may be a legitimate way of dealing with hate propaganda but this does not deny the legitimate and important role that criminal law has to play in dealing with expressions of racial hatred.

(III) CONCLUSION

The majority concluded its s.1 analysis by finding that the advantages of s.319(2) easily outweighed any harmful effects it had on freedom of expression. This

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> If a stereotypical image of a certain class of persons as incompetent, childish and funny is allowed to be displayed, the opportunities of members of the class for responsible jobs and to obtain rights on an equal footing with the majority class grouping are endangered. The effect of such a caricature is to reinforce prejudice against blacks and as a consequence to prolong the existence of hangovers of prejudice against non-white minority groups in Canada. It also promotes a negative image about blacks. In the above sense the representation in question indicates discrimination against blacks, and falls within the meaning of Section 4(1). (*Singer, supra* note 191 at 4.)

As a result, Iwasyk was ordered to remove the caricature from the sign on the restaurant and to cease and desist from publishing or displaying the name, symbol or caricature of a "sambo." [Note - the decision of the Commission was temporarily disturbed via a writ of *certiorari* which was granted by the Saskatchewan Court of Queen's Bench, not on the merits of the case but on a jurisdictional ground that was later found to be invalid by the Court of Appeal, see [1978] 5 W.W.R. 499.]

conclusion stemmed from the earlier finding by the Chief Justice that hate propaganda was only marginally associated with the values underlying s.2(b) of the *Charter*.

H. FACTORS NOT CONSIDERED BY MCLACHLIN J. IN THE *KEEGSTRA* S.1 ANALYSIS

There are a number of factors which, if they had been considered by McLachlin J. when she was writing her dissent in *Keegstra*, may have driven her to use a more deferential or flexible approach under s.1, and possibly conclude that s.319(2) of the *Code* should be upheld under s.1 of the *Charter*. For instance, relying on the ruling in *Edwards Books*, it can be argued that because s.319(2)'s objective is to protect historically disadvantaged groups in society, its s.1 burden is easier to meet than a provision that does not aim to protect the vulnerable. While the link between hate propaganda and the acceptance of a hateful ideology, or the motivation to commit hate crimes, cannot be proved to a scientific nicety, there is a great deal of scientific evidence to suggest such links do exist.[192] Moreover, by enacting s.319(2) the government can be seen to be mediating between those groups that hold racist or supremacist ideas and target groups. Consequently, pursuant to *Irwin Toy*, as Parliament's assessment in enacting s.319(2) of the *Code* involves weighing conflicting

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[192] See, for example the evidence cited in M.J. Matsuda, *supra* note 11 at 24-26, particularly Greenberg & Pyszcynski, *The Effect of an Overheard Ethnic Slur on Evaluation of the Target: How to Spread a Social Disease*, 21 J. Experimental Soc. Psychology 61, 70 (1985).

scientific evidence and mediating between competing claims of different groups in the community, the s.1 burden should be lighter.[193]

I. FACTORS NOT CONSIDERED BY DICKSON C.J.C. OR MCLACHLIN J. IN THE *KEEGSTRA* S.1 ANALYSIS

If *Keegstra* were to be decided today, the Court would have to consider whether there is proportionality between the deleterious and salutary effects of s.319(2). This consideration arises from the ruling of the Supreme Court in *Dagenais*. In *Dagenais*, Lamer C.J.C. acknowledged that "[i]n many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective."[194] In these situations, the s.1 inquiry ends with the portion of the *Oakes* test requiring a balance between the extent of the infringement of the *Charter* right and the importance of the legislative objective. However, Lamer C.J.C. went on to state that

> [a]t other times . . . the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that . . . the . . . *Oakes* test requires both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary

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[193] In *Irwin Toy*, the Court suggested that it was appropriate to apply s.1 with less scrutiny when the legislature was mediating between competing claims of different groups in the community. This was held to be especially so when the assessment involved weighing conflicting scientific evidence and the allocation of scarce resources (*Irwin Toy*, *supra* note 1 at 622-623).

[194] *Dagenais*, *supra* note 114 at 305.

> effects of the legislation will not be sufficient to justify these negative effects.[195]

Thus, when the legislative measure at issue results in only the partial achievement of its objective, an altered s.1 test is to be utilized. This altered s.1 test requires that the usual *Oakes* test be complied with as well as the additional element that there be proportionality between the deleterious and salutary effects of the legislative measure.

Section 319(2) only partially achieves its objectives of protecting targeted groups and promoting societal cohesiveness because much of the hate propaganda coming into Canada, via the Internet and other means, is coming in from foreign countries. Pursuant to s.6(2) of the *Code*, no person shall be convicted of an offence committed outside Canada, except for certain offences explicitly designated by Parliament.[196] The hate propaganda offences in the *Code* have not been so designated by Parliament.

The Supreme Court has had an opportunity to judicially consider s.6(2) of the *Code*. In *R.* v. *Libman*,[197] the Court held that all that is necessary to make an offence subject to the jurisdiction of Canadian courts is that a significant portion of the activities constituting the offence take place in Canada. There must be a real and substantial link between the offence and Canada in order for Canadian authorities to be able to prosecute. In determining whether there is a real and substantial link between

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[195] *Ibid.*

[196] An example of a type of an offence committed outside Canada that can be prosecuted by Canadian authorities is war crimes, see s.7(3.71) - s.7(3.77) of the *Code*.

[197] *R.* v. *Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.) [hereinafter *Libman*].

the offence and Canada, courts must consider whether prosecuting the case would offend international comity.[198] The outer limits of the test of a real and substantial link are coterminous with the requirements of international comity.[199]

In *Libman*, the Court was dealing with a charge of fraud whereby fraudulent inducements were made by persons in Canada over the telephone to residents of the United States and some of the proceeds found their way back into Canada. In finding that the charges were properly tried in Canada, the Court considered the issue of international comity:

> How considerate is it of the interests of the United States in this case to permit criminals based in this country [Canada] to prey on its [American] citizens? How does it conform to its interests or to ours for us to permit such activities when law enforcement agencies in both countries have developed co-operative schemes to prevent and prosecute those engaged in such activities?[200]

Libman's activities would constitute an offence under either American or Canadian criminal law. Consequently, the prosecution of Libman by Canadian authorities could not offend international comity.

However, the case is quite different when dealing with an American who is sending hate propaganda into Canada from the United States via the Internet or other means. The American in this scenario would be engaging in an activity which is likely

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[198] *Ibid.* at 233. "Comity" means "kindly and considerate behaviour toward others." (*Libman, supra* note 197 at 233.)
[199] *Ibid.* at 233.
[200] *Libman, supra* note 197 at 233.

lawful and constitutionally protected in America[201] but unlawful in Canada. For Canadian authorities to prosecute such an individual may offend international comity. As a result, in many cases, those individuals who are situated abroad can send and disseminate hate propaganda in Canada without fear of Canadian criminal prosecution. One way to overcome this obstacle is for Canada to enter into international agreements with other countries. These agreements would allow Canada to prosecute those individuals who send hate propaganda into Canada from the country that is the other party to the agreement.[202]

As s.319(2) is not currently perfectly effective in dealing with the problem of hate propaganda, and there is at least some chilling effect on freedom of expression created by the legislation, is there proportionality between the deleterious and salutary effects of the legislation? Such an argument was made in *Little Sisters*. In that case, the Little Sisters Book and Art Emporium argued that customs legislation authorizing the inspection and seizure of materials deemed to be obscene was unconstitutional.

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[201] L. Tribe, *American Constitutional Law*, 2nd Ed. (Mineola, N.Y.: Foundation Press, 1988) at 861.

[202] In these international agreements, it may be desirable to draw a distinction between those individuals situated abroad who intentionally and specifically target Canada for the dissemination of their hate propaganda (e.g. hate propaganda is mailed from abroad to Canada via Canadian mailing lists) and those individuals who inadvertently send hate propaganda into Canada (e.g. a hateful broadcast emanates from the United States and is meant for an American audience but is picked up by Canadian televisions). From a political perspective, an international agreement allowing Canadian authorities to prosecute those individuals in the former situation may be easier to obtain than an agreement allowing Canadian authorities to prosecute those individuals encompassed by the latter situation.

They based part of their argument on the proposition that there was no proportionality between the deleterious and the salutary effects of the legislation.

The Little Sisters Book and Art Emporium asserted that the customs legislation was ineffective because it caught only a small proportion of the obscenity crossing into Canada.[203] In the same way, it could be argued that as s.319(2) can only potentially catch a small proportion of those who disseminate hate propaganda in Canada, namely those who spread hate propaganda from and within Canada, that the salutary effects of s.319(2) are limited. This argument would be based on the assumption that most of the hate propaganda being disseminated in Canada is being done from abroad via the Internet or other means and thus is beyond the reach of s.319(2). There have been no recent comprehensive studies or surveys concerning hate propaganda in Canada. Consequently, it is uncertain as to whether most hate propaganda in Canada is domestic or imported. Thus, it would be impossible to support the argument that s.319(2) potentially catches only a small proportion of hate propaganda in Canada. Given that there is no evidence establishing that s.319(2) has limited salutary effects and that any chilling effect on freedom of expression is limited, there is a strong argument for finding that there is proportionality between the deleterious and salutary effects of s.319(2) of the *Code*. Certainly there is a compelling case for this legislation to be saved by s.1 of the *Charter*.

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[203] *Little Sisters, supra* note 176 at 551.

V. SECTION 11(D) OF THE *CHARTER* AND *KEEGSTRA*

In *Keegstra*, the Court unanimously agreed that s.319(3)(a) infringed s.11(d) of the *Charter*. The Supreme Court thereby resolved a disagreement between the Ontario and Alberta Courts of Appeal. The Ontario Court of Appeal in *R.* v. *Andrews*[204] concluded that s.319(3)(a) did not raise a true reverse onus because the accused was not required to disprove an essential element of the offence to escape conviction. The Alberta Court of Appeal in *R.* v. *Keegstra*[205] found that s.319(3)(a) did infringe s.11(d) of the *Charter* because an accused could be convicted under s.319(2) of the *Code* despite there being a reasonable doubt as to the truth of his/her statements. In other words, the Alberta Court of Appeal held that s.11(d) of the *Charter* was infringed if the accused was required to prove any fact on the balance of probabilities to escape conviction, whether or not such fact related to an essential element of the offence. A unanimous Supreme Court, relying on its own recent precedent, *R.* v. *Whyte*,[206] decided that the Alberta Court of Appeal's interpretation of the law was correct.

However, the Supreme Court was divided as to whether s.319(3)(a) was saved by s.1 of the *Charter*. Dickson C.J.C. wrote the majority judgment on this issue. He based his judgment on the idea that s.319(3)(a) protected truthful statements while at the same time making the defence of truth not too readily available in regard to hateful statements because, true or not, harm was still caused by hate propaganda.

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[204] *R.* v. *Andrews* (1988), 65 O.R. (2d) 161 (Ont. C.A.).
[205] *R.* v. *Keegstra* (1988), 65 C.R. (3d) 289 (Alta. C.A.).
[206] *R.* v. *Whyte* [1988] 2 S.C.R. 3 (S.C.C.).

Consequently, he held that s.319(3)(a) was saved by s.1. McLachlin J. wrote the judgment suggesting that s.319(3)(a) was not saved by s.1 of the *Charter*. She based her judgment on the idea that, as it was the state that had superior resources, it, rather than the accused, should have the burden of proving the falsity of statements. Recently, she concurred in a unanimous decision upholding s.319(3)(a) of the *Code* as a reasonable limit under s.1 of the *Charter*.[207] More is said about the defence of truth in Chapter Four.

VI. POST *KEEGSTRA*

Since the Supreme Court's ruling in *Keegstra*, there has not been a flood of litigation under s.319(2) of the *Code*. In fact, since the Supreme Court's decision in *Keegstra*, there has been only one new reported case under s.319(2).[208] Instead of a flood of new cases under s.319(2), the courts are still occupied by the Keegstra case itself. After the Supreme Court's ruling on the constitutionality of ss.319(2) and 319(3)(a), Keegstra's case was sent back to the Alberta Court of Appeal. The Court of Appeal quashed his conviction and ordered a new trial, saying that Keegstra's lawyer should have had an opportunity, on account of the significant pretrial publicity, to

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[207] See *R.* v. *Keegstra* [1996] S.C.J. No.21 (QL).

[208] The case is *R.* v. *Safadi* (1993), 108 Nfld. & P.E.I.R. 66 (P.E.I.S.C. Trial Div.) affirmed (1994), 121 Nfld. & P.E.I.R. 260 (P.E.I.S.C. App. Div.) [hereinafter *Safadi*]. In this case, the accused sent 45 letters to religious groups, police forces, government agencies, and members of the Lebanese community. The letters attacked Christianity and government institutions using highly provocative and disgusting language. The accused was found to have authored these letters and to have made them appear to have originated from a Jewish source. As a result, he was found guilty of wilfully promoting hatred against Jews.

challenge the jurors for cause.[209] Keegstra was retried and was again found guilty. This time he was given a fine of $3000. He again appealed his conviction to the Court of Appeal. And again, the Court of Appeal overturned his conviction based on the trial judge refusing the jury's request for a transcript of a witness' testimony and for copies of the charging sections. As a result, the Court of Appeal ordered a new trial.[210] The Supreme Court reinstated Keegstra's conviction and found that the second trial judge did not commit reversible error.[211]

Then the Crown and defence appealed Keegstra's sentence, with the Crown seeking a custodial disposition and the defence seeking a fine of less than $3000.[212] On September 26, 1996 the Alberta Court of Appeal released its decision regarding the Keegstra sentence appeal. Although the Court agreed with the Crown that Keegstra's crime deserved a sentence of imprisonment in order to "express society's unconditional rejection of hatemongering, to emphasize the harm to society done by those who preach racial hatred, and to deter those of a like mind,"[213] the Court only imposed a suspended sentence. The reason that the Court gave for this result was that the long history between the commencement and the end of Keegstra's criminal prosecution served as a mitigating factor for sentencing because of the added expense for Keegstra

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[209] *R.* v. *Keegstra* (1991), 114 A.R. 288 (Alta. C.A.).
[210] *R.* v. *Keegstra* (1994), 23 Alta. L.R. (3d) 4 (Alta. C.A.).
[211] *R.* v. *Keegstra* [1996] S.C.J. No. 21 (QL).
[212] Per conversation between the author and Jack Watson, Appellate Counsel for the Attorney General of Alberta.
[213] *R.* v. *Keegstra* (26 September 1996), Calgary Appeal # 13544 at 5 (Alta. C.A.).

and the extended anxiety for him and his family.[214] Consequently, the Court imposed a suspended sentence of one year on Keegstra and released him on probation for that period. Among the conditions of Keegstra's suspended sentence are that he perform 200 hours of community service work and that he not attempt to preach hatred of the Jewish people to anybody, including hatemongering that is thinly disguised as historical research.[215]

VII. CONCLUSION

The Supreme Court's judgment in *Keegstra*, the leading case concerning the offence of the wilful promotion of hatred, has been analyzed. I have argued that the Court's approach in providing hate propaganda protection under s.2(b) of the *Charter* is preferable to the option of carving out a narrow category of extreme expression which is not to be given constitutional protection at all. In addition, I have argued that criminal law is a proportionate response to hate propaganda in the context of the s.1 analysis. These same arguments, particularly the argument based on the educative effect of the criminal law, also support the position that criminal law is an appropriate way of dealing with hate propaganda.

The Supreme Court's decision in *Keegstra*, one of the most comprehensive rulings to be rendered by a high court on the issues of the freedom of expression and hate propaganda, has great ongoing significance in Canada. The two substantive

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[214] *Ibid.* at 8.
[215] *Ibid.* at 10.

offences, other than the wilful promotion of hatred, contained in the hate propaganda sections of the *Code* have yet to be the subject of direct litigation. Moreover, with the ever-increasing reach of mass media and mass communication, Parliament may be called upon to reform its hate propaganda laws in order to help ensure that a multicultural Canada survives into the 21st century. *Keegstra* will strongly influence judges and law makers who delve into this controversial area in the future.

CHAPTER THREE

OTHER *CODE* PROVISIONS PROSCRIBING EXPRESSIONS OF RACIAL HATRED

I. INTRODUCTION

In Chapter Two, the offence of wilfully promoting hatred against an identifiable group is analyzed. In particular, the Supreme Court of Canada's ruling in *Keegstra* is assessed. Using the approach of the Court in that case, this chapter examines the remaining two substantive offences which the hate propaganda sections of the *Code* provide. And, finally, the offence of spreading false news is reviewed.

II. ADVOCATING GENOCIDE

Genocide's history goes back to the origins of human communities. Distrust, fear, and ignorance of other communities, or of strangers entering established communities, often led to blood feuds among ancient groups. Unfortunately, humanity's tolerance has not evolved as quickly as has its technological prowess. The result has been a 20th century replete with examples of the systemic extermination of entire races by means of modern technology and the bureaucratic apparatus of the State.[216] Some of these barbarous acts include the Tutsi massacres of Hutu in Burundi in 1965 and 1972, the Paraguayan attack on Ache Indians in 1973, and the Khmer

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[216] P. Akharan, "Enforcement of the Genocide Convention by Means of Judicial Mechanisms" (1994) Can. Council Int. L. 117 at 117.

Rouge's reign of terror in Kampuchea between 1975 and 1978. Most recently, the 1990s has seen genocidal violence occur in East Timor, Bosnia, and Rwanda.

The Holocaust is the best known example of genocide in the 20th century. After this chapter in human history, genocide became recognized as the ultimate crime. As French Prosecutor Champetier de Ribes said in his summation before the International Military Tribunal at Nuremberg: "This is a crime so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term "genocide" has had to be coined to define it."[217]

As a result of the revelations of the Holocaust, the *Convention on the Prevention and Punishment of the Crime of Genocide*[218] was adopted by the General Assembly of the United Nations in 1948. The *Genocide Convention* came into force in Canada on December 2, 1952. It was partially to fulfill Canada's obligations under the *Genocide Convention* that Parliament enacted the offence of advocating genocide.

The Cohen Report offered the view that existing Canadian law already prohibited acts of genocide by way of the offences prohibiting homicide against individuals. However, the Cohen Report argued that incitement to commit murder would not cover incitement to genocide because murder pertained to the killing of specific individuals, not to the annihilation of an entire group. As stated by J.A.

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[217] *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 November 1945 - 1 October 1946, (Nuremberg: International Military Tribunal, 1947), vol. I., at 531.

[218] *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) 78 U.N.T.S. 278 [hereinafter *Genocide Convention*].

Scollin, of the Criminal law section of the Department of Justice, at the time the offence of advocating genocide was being considered for adoption within the *Code*:

> My position is that there is no offence just now under the *Criminal Code* that I, as a prosecutor, could frame a proper valid charge under. In respect to an individual or the identifiable individual there might be incitement or conspiracy and there might be a charge. There is no charge in advocating or promoting genocide. In law there would be no charge.[219]

Subsequently, the government included the offence of advocating genocide in its draft legislation amending the *Code*.

Section 318 of the *Code* makes the advocating of genocide a criminal offence. The relevant legislative provisions are as follows:

> 318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
> (2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
> (a) killing members of the group; or
> (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
> (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
> (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

Given that a prosecution under this provison has never proceeded to trial,[220] it is necessary to determine whether, using the analysis in *Keegstra*, s.318 of the *Code* would be deemed to be constitutional.

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[219] Canada, Proceedings of the Senate Committee on Legal and Constitutional Affairs, *First Proceedings on Bill S-21*, No. 1 (13 February 1969) at 11.

It must first be determined whether s.318 of the *Code* infringes s.2(b) of the *Charter*. Section 2(b), as interpreted by the Supreme Court in *Irwin Toy* and later in *Keegstra*, protects all content of expression and all forms of expression except violence. Section 318's purpose is to penalize the communication of a particular thought or idea - that genocide should be committed against a certain group of people. Thus, it aims to suppress the very content of the message. Moreover, *Keegstra* indicates that the type of expression contemplated by s.318 cannot be equated with violence as a form of expression. Although the person who advocates or promotes genocide will have urged others to commit an act of violence, he or she may not have chosen violent means to convey this message.[221] As a result, it seems that s.318 of the *Code* would be found to infringe s.2(b) of the *Charter*.

Turning to the question of s.1 justification, the objectives of s.318 are similar to those of s.319(2), namely, to protect target groups and to promote social cohesion. Both these objectives were found by the Supreme Court in *Keegstra* to be of sufficient importance to warrant overriding s.2(b) of the *Charter*. In *Keegstra*, the majority of the Supreme Court used ss.15 and 27 of the *Charter* to emphasize the importance of the objective pertaining to s.319(2) of the *Code*. It is my view that these sections of the *Charter* can also bolster the importance of the objectives of s.318. In addition, s.7

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[220] A prosecution was initiated under s.318 of the *Code* in Manitoba, but the charge was stayed by the Crown prior to the commencement of the trial. ("National General News" *Canadian Press 92* (8 September 1992) (QL).)

[221] K. Dubick, *supra* note 26 at 171.

of the *Charter* can be used to demonstrate the pressing and substantial nature of s.318. Section 7 states: "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." It can be argued that, for individuals belonging to target groups, the advocacy of genocide may be a threat to their "security of the person" because these individuals might fear what would happen should the hatemonger's goal be realized, no matter how remote a possibility this realization may be.[222] Finally, just as the Supreme Court did in *Keegstra*, Canada's international obligations can be used to show that the legislation's purpose is pressing and substantial. In the case of s.318, Canada's obligations under the *Genocide Convention* can be utilized.[223] Consequently, it is likely that s.318 would be found to pass the first step of the s.1 test.

Is s.318 rationally connected to its objectives? For the reasons given by the majority of the Supreme Court in *Keegstra*, regarding the effectiveness of the criminalization of hate propaganda, it can be argued that s.318 would be found to be rationally connected to its objectives. Another reason that s.318 passes this phase of the *Oakes* test is articulated in the Cohen Report. The Cohen Report stated that s.318 served as "an emphatic public declaration of our total commitment to the elimination of

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[222] *Ibid.* at 172.

[223] Canada's obligations under the *Genocide Convention* are examined more thoroughly in Chapter Four.

this most inhuman manifestation of prejudice and a reassurance to any minority groups in our midst that promoting such a concept in public discussions is beyond the pale."[224]

The next phase of the *Oakes* test is the determination of whether the impugned legislative means impair the right or freedom concerned as little as possible. There are several reasons why s.318 of the *Code* can be supported as a minimal impairment of s.2(b) of the *Charter*. First, the definition of genocide in s.318 is narrow and specific. It does not include cultural genocide within its ambit.[225] Moreover, as stated by Dubick:

> [t]he definition of "identifiable group", rather than being open-ended, consists of an exclusive list of carefully selected groups. The legislation was drafted to protect only those groups perceived to be most susceptible to the harmful effects of hate propaganda. In addition, the reference to "any section of the public" indicates that the group under attack must either reside, or be temporarily located in Canada. Thus, no one would be prevented from advocating war or retaliatory action against a foreign authority.[226]

However, s.318 has potential problems under this phase of the *Oakes* test. The fact that the offence of advocating genocide does not expressly exempt statements made in private conversation may prove to be a difficulty. In holding that s.319(2) minimally impairs s.2(b), the majority of the Supreme Court in *Keegstra* relied on the

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[224] Cohen Report, *supra* note 31 at 62.

[225] Cultural genocide is defined by Dubick as the "destruction of the specific character of the group, whether by forcibly transferring children away from the group, prohibiting the use of the group's national language, or by confiscating and destroying those books, documents, monuments, and objects of historical, artistic or religious value that are an integral part of the cultural heritage of that group." (See K. Dubick, *supra* note 26 at 175.)

[226] K. Dubick, *supra* note 26 at 176.

fact that statements made in private conversation were not caught by s.319(2). John Turner, then the Minister of Justice, stated that a person advocating genocide while attending a private meeting on private property would not be prosecuted under s.318 of the *Code*. He pointed to the requirement of the consent of the Attorney General before a prosecution under s.318 could commence as being adequate protection against such frivolous prosecutions.[227] Despite this reassurance, it should be kept in mind that the requirement of the Attorney General's consent played no part in the determination of the constitutionality of s.319(2) in *Keegstra*, despite the fact that s.319(2) also requires the prior consent of the Attorney General for prosecution. Moreover, as stated by Mr. Justice Kerans in the Alberta Court of Appeal ruling regarding the constitutionality of s.319(2) of the *Code*, "trust in prosecution discretion is not a defensible section 1 position."[228] Consequently, s.318 of the *Code* may have some difficulty passing the minimal impairment phase of the *Oakes* test.

In the last phase of the *Oakes* test, it seems likely that courts would find there is a proportionality between the importance of the state objective represented by s.318 of the *Code* and the effect of s.318 on s.2(b) of the *Charter*. In this last phase of the *Oakes* test, courts would be cognizant of the Supreme Court's ruling in *Keegstra* that hate propaganda is only tenuously linked to the core values underlying freedom of expression. They would also be mindful of the Supreme Court's ruling in *Edwards*

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[227] *House of Commons Debates* (6 April 1970) at 5526.
[228] *R.* v. *Keegstra* (1989) 43 C.C.C. (3d) 150 at 177 (Alta. C.A.).

Books that the *Charter* should seldom be used to strike down a provision that protects vulnerable groups and individuals. This latter consideration may be strong enough to motivate courts to ignore s.318's potential overbreadth.[229]

III. PUBLIC INCITEMENT OF HATRED

Section 319(1) of the *Code* makes the public incitement of hatred a criminal offence. The relevant legislative provisions are as follows:

> 319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> (b) an offence punishable on summary conviction.

There is no requirement that the Attorney General must authorize a proceeding under this section.

There are no reported cases of prosecutions under s.319(1). However, in *Buzzanga*, Martin J.A., in *obiter*, commented on the mental element necessary for the offence of public incitement of hatred to be made out:

> Section 281.2(1) [now s.319(1)], unlike s.281.2(2) [now s.319(2)], is restricted to the incitement of hatred by communicating statements in a public place where such incitement is likely to lead to a breach of the peace. Although no mental element is expressly mentioned in s.281.2(1), where the communication poses an immediate threat to public order, mens rea is, none the less, required since the inclusion of an offence in the *Criminal Code* must be taken to import mens rea in the absence of a clear intention to dispense with it . . . The general mens rea which is required and which suffices for most crimes where no mental element

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[229] For the reasons mentioned in relation to s.319(2) of the *Code* in Chapter Two, it is my opinion that, in regard to all three substantive hate propaganda offences, there is proportionality between the deleterious and salutary effects of the legislation.

> is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result which the law, in creating the offence, seeks to prevent and, hence, under s.281.2(1) is either the intentional or reckless inciting of hatred in the specified circumstances.[230]

Consequently, the offence of public incitement of hatred may be committed even where the accused has no intention of inciting hatred but is cognizant of the risk that his or her expression will incite hatred and persists in engaging in this expression.

Turning to the question of s.319(1)'s constitutionality, it seems as though this offence will be deemed to infringe s.2(b) of the *Charter*. When Parliament enacted s.319(1) it was not merely concerned with breaches of the peace but also with the communication of statements that incite hatred. Therefore, the offence amounts to a restriction tied to content and will probably be held to violate s.2(b) of the *Charter*.

The objectives of s.319(1) are those identified in *Keegstra* as being pressing and substantial, namely, the promotion of societal cohesion and the protection of target groups. It could even be argued that the objectives behind s.319(1) are more pressing and substantial than those of s.319(2) because another objective of s.319(1) is the preservation of public order. As a result, it is likely that the objectives of s.319(1) of the *Code* would be found to be pressing and substantial in a free and democratic society and , thus, the first phase of the s.1 test would be met.

It can also be shown that s.319(1) is rationally connected to its objectives. As stated by the majority of the Supreme Court in *Keegstra*, the criminal suppression of

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[230] *Buzzanga*, *supra* note 170 at 717.

hate propaganda is rationally connected to the protection of target groups and the promotion of societal cohesion by being a comfort to the Canadians who belong to identifiable groups and by reminding all of Canadian society of the value of multiculturalism and equality.

The question of minimal impairment of s.2(b) of the *Charter* by s.319(1) is more contentious. It has been argued that s.319(1) is overbroad because it applies to all statements communicated in a "public place," including those statements made in private conversation. During the proceedings of the House of Commons Standing Committee on Justice and Legal Affairs, Mr. Hogarth, a member of the Committee, argued that if the hatred was expressed in a public place, but in a private conversation, it should not fall within the ambit of the offence. To this argument the then Justice Minister John Turner responded:

> [T]he gravamen of the offence is the incitement likely to lead to a breach of the peace . . . The breach of the peace might arise from an escalation of a private conversation in a public place and that is the foundation of the offence . . . Whether or not incitement begins in a private conversation in a public place or by way of a declaration from a public platform in a public place is incidental. If it escalates into a situation that is likely to lead to a breach of the peace, then the offence in our view is committed.[231]

Practically speaking, it is unlikely that a private conversation would lead to a breach of the peace. Moreover, the wording of s.319(1) makes it impossible for a heckler's veto situation to arise whereby a person is punished solely because others react hostilely to

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[231] Canada, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 10 (24 February 1970) at 10:64-10:65.

his or her views.[232] For a speaker's statements to be caught within the scope of s.319(1), the expression must be such as to incite hatred against an identifiable group. Thus, innocuous language to which a sensitive audience reacts violently would not expose the speaker to criminal sanctions under this section. The speaker must be the author of his or her own misfortune by, at the very least, being conscious of the risk that his or her speech may incite hatred and deciding to engage in the expression anyway.

In *Keegstra*, Dickson C.J.C. used the specific mens rea requirement in s.319(2) and the defences to s.319(2) contained in s.319(3) to show that s.319(2) was a reasonable limit under s.1 of the *Charter*. These factors cannot be used to demonstrate s.319(1)'s minimal intrusion on s.2(b) of the *Charter*. The defences in s.319(3) do not apply to the public incitement of hatred and, unlike s.319(2), s.319(1) is a crime of recklessness. It can also be argued that the consent of the Attorney General required for a proceeding under s.319(2) is a safeguard that ensures minimal impairment of an individual's freedom of expression. This safeguard is not provided by s.319(1) and, as a result, it can be argued that s.319(1) does not minimally impair the s.2(b) freedom.

The counterargument is that, in situations where a breach of the peace is likely, it is impractical for law enforcers to obtain the Attorney General's consent to lay a charge if they are to act in time to avert public upheaval. It is this added element of

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[232] Cohen Report, *supra* note 31 at 63-64.

preventing public disorder that explains why the Cohen Committee suggested making s.319(1) an offence of recklessness and not strict intention:

> [T]he social interest in the preservation of peace in the community is no less great where it may not be possible for the prosecution to prove that the speaker actually intended violence against a group, or where the wrath of the recipients is turned not against the group assailed, but rather against the communicator himself, and the breach of the peace takes a different form from that which he was likely to intend.[233]

As for the defences in s.319(3), Dickson C.J.C., in *Keegstra*, stated that these defences were merely examples of expressive activity that did not fall within the wilful promotion of hatred.[234] Thus, they are superfluous and would be available even without express mention. Consequently, the absence of stated defences to s.319(1) should not impair its constitutional status. In addition, given that hate propaganda has been found not to be closely related to the core values of freedom of expression, it is reasonable to infer that the benefits conferred by s.319(1) would be found to outweigh its effects on freedom of expression. In the end, there is a strong possibility that s.319(1) would be found to be constitutionally valid under s.1 of the *Charter*.

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[233] Cohen Report, *supra* note 31 at 63.

[234] More accurately, Dickson C.J.C. said this about all the defences except the defence of truth. (See *Keegstra, supra* note 16 at 196.) The defence of truth is examined in more detail in Chapter Four.

IV. SPREADING FALSE NEWS

A. HISTORY AND EARLY JURISPRUDENCE

The origins of the offence of spreading false news can be traced to the year 1275 and the English offence of *De Scandalis Magnatum*.[235] It read as follows:

> Forasmuch as there have been oftentimes found in the Country Devisors of Tales, whereby discord or occasion of discord, hath many times arisen between the King and his People, or Great Men of this Realm; for the Damage that hath and may thereof ensue; It is commanded, That from henceforth, none be so hardly to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm; and he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, which was the first Author of the Tale.

The purpose of this offence was to preserve political harmony by preventing slanders against the monarchy and the nobility. Commission of this offence meant loss of the ears for the words and loss of the right hand for the writing which formed the subject matter of the offence.[236]

De Scandalis Magnatum was repealed in England in 1888. However, before its repeal it gave rise to article 95 of Stephen's *Digest of the Criminal Law* which stated:

> Everyone commits a misdemeanor who cites or publishes any false news or tales whereby discord or slander may grow between the Queen and her people, or the great men of the realm (or which may produce other mischiefs).[237]

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[235] *The Statutes of the Realm*, 3 Edw. 1, c.34, Vol. 1 (1810, reprinted London: 1963, Dawsons of Pall Mall at 35).
[236] F.R. Scott, "Publishing False News" (1952) 30 Can. Bar. Rev. 37 at 38.
[237] J.F. Stephen, *Digest of the Criminal Law*, 1st ed. (London: MacMillan and Co., 1878) at 62.

The *Code* of 1892 was based, in part, on Stephen's Digest and as a result, the first formulation of a Canadian offence of spreading false news borrowed heavily from article 95. Section 126 of the *Code* of 1892 stated:

> 126. Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest.[238]

At the time of its adoption into the *Code*, the offence of spreading false news was in the "Sedition" section of the statute. As revealed by a comparison of the text of the offence of *De Scandalis Magnatum* and s.126, the notion of "discord and slander between the King and his People or the Great Men of the Realm" was replaced by "injury or mischief" to "any public interest."[239]

The first case under this Canadian legislation was *R.* v. *Hoaglin*[240]. The accused was a store merchant in Taber, Alberta who advertised a closing out sale by posting notices in his store window which read:

> Closing out sale. We have decided to leave Canada. We will now offer our entire stock for sale at the actual wholesale cost. Americans not wanted in Canada. Investigate before buying lands and taking homesteads in this country. Ten thousand dollars worth of new goods arriving. Men's clothing, women's skirts. All kinds of dry goods. Everything will be sold at actual cost. Cash Buyer's Union, Taber, Alberta.[241]

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[238] *Criminal Code, 1892*, S.C. 1892, c. 29.
[239] F.R. Scott, *supra* note 236 at 39.
[240] *R.* v. *Hoaglin* (1907), 12 C.C.C. 226 (N.W.T.S.C.) [hereinafter *Hoaglin*].
[241] *Ibid.* at 227

The accused had also ordered 500 copies of the notice to be printed for distribution. The notice was deemed to constitute false news because of its assertion that Americans were not wanted in Canada. This false news was found to be contrary to the public interest because the Alberta government sought to attract American immigration. Consequently, Hoaglin was found guilty of the offence and was sentenced to pay a fine of $200 or, in default, to be imprisoned for three months. In finding the accused guilty, Harvey J. stressed that the offence was aimed at false statements of fact as opposed to statements of opinion:

> The words themselves under certain circumstances, would not amount to an offence. If a newspaper in discussing the public policy of the country stated that it did not think it was in the interest of Canada that citizens of the United States should come in here, I do not think that would be a matter which would be properly dealt with under this section of the *Code*.[242]

But can it not be argued that what Hoaglin's notices did was express his opinion that Americans were not wanted in Canada? The contentious characterization of Hoaglin's notice as constituting a statement of fact as opposed to a statement of opinion is not the only questionable aspect of Harvey J.'s decision. As shown by the decision in *R.* v. *Carrier*,[243] Harvey J. also may have misinterpreted the law.

In *Carrier*, the accused was originally charged with seditious libel for publishing the same pamphlet that formed the subject matter of the charge in *Boucher* v. *R.*[244] The pamphlet was entitled "Quebec's Burning Hate for God, Christ and Freedom is the

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[242] *Ibid.* at 228.
[243] *R.* v. *Carrier* (1951), 104 C.C.C. 75 (Que. K.B.) [hereinafter *Carrier*].
[244] *Boucher* v. *R.* [1951] 2 D.L.R. 369 (S.C.C.) [hereinafter *Boucher*].

Shame of all Canada." It contained a vigorously worded protest against what was described as the hateful persecution of Jehovah's Witnesses by mainly Roman Catholic Quebecers. The Supreme Court in *Boucher* held that, in order to convict a person for seditious libel, there must be a direct incitement to violence or a breach of the peace, and the simple promotion of ill will between different classes of the public did not suffice. As a result of this ruling, Carrier was acquitted of seditious libel. He was then charged with spreading false news.

The Court, in dealing with the charge of spreading false news, took into account the fact that the offence was under the "Sedition" section of the *Code*. Because of this, Drouin J. held that the "public interest" in spreading false news should be equated with sedition. As a result, speech which spread discord among citizens but did not issue in violent conduct was not deemed to be contrary to the public interest. Thus, Carrier was acquitted of spreading false news. Because Hoaglin's notice did not constitute a direct incitement to violence or a breach of the peace, it is my view that he also should have been acquitted of spreading false news.

In 1955 the offence of spreading false news was removed from the "Sedition" section of the *Code* and re-enacted under the "Nuisance" section of the *Code*. The modern section containing the offence states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

A possible interpretation is that, by removing the offence from the "Sedition" section of the *Code*, Parliament effectively overruled the decision in *Carrier* which restricted the meaning of "public interest" to the *Boucher* definition of sedition.

The first case decided under the re-enacted section was *R.* v. *Kirby*.[245] The accused was the publisher of an underground newspaper, the *Logos*, which parodied a serious newspaper, Montreal's *Gazette*. The *Logos* contained a false story that the mayor of Montreal was shot by a drug-crazed hippie. Unbeknownst to the publisher, the *Logos* was being sold on newsstands with its front page containing the words "Logos" folded over so that the parodied "Gazette" page, containing the false story, appeared as the front page. There was no evidence as to how the folding had been reversed. The result was a number of phone calls by concerned citizens to the Mayor's office and to the *Gazette*'s night editor, and the eventual laying of a charge under the false news section of the *Code* against Kirby.

At trial, Kirby was convicted of spreading false news. However, on appeal, the Quebec Court of Appeal found that there had been no intention to pass the satire off as news, let alone as false news, and therefore there was no intent to commit the offence. As a result, the Court of Appeal overturned the conviction. The Court also stated that the embarrassment and inconvenience caused by the article to the night editor of the *Gazette* and the Mayor did not constitute an "injury or mischief to a public interest." Unfortunately, the Court did not say why. The Court explicitly refused to define what

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[245] *R.* v. *Kirby* (1970), 1 C.C.C. (2d) 286 (Que. C.A.) [hereinafter *Kirby*].

may constitute an "injury or mischief to a public interest" but it did say that Kirby's prank came very close to being such an injury.[246]

B. THE CASE OF ERNST ZUNDEL

Scott, in his 1952 article, suggests that the offence of spreading false news could be used to combat racist statements,[247] but it was not until 1984 that s.181 of the *Code* was used in this manner. In that year, Ernst Zundel, a commercial artist living in Toronto, was charged with two counts of spreading false news. The charges arose from the publication of two pamphlets: The *West, War and Islam!* and *Did Six Million Really Die?* The *West, War and Islam!* was not distributed in Canada and therefore Zundel was acquitted of the first count.[248] *Did Six Million Really Die?* is part of a genre of literature known as revisionist history. Its professed author is Richard Harwood, a specialist on World War II from the University of London. However, the article appears to have been written by Richard Verral, editor of the neo-Nazi British *National Front* newspaper.[249] Zundel added a preface and an afterword to the text of the article. Some of the statements made in the article include:

> - [T]he Nazi concentration camps were only work camps; that gas chambers were built by the Russians after the War; that the millions who disappeared through the chimneys of the crematoria at Auschwitz, Sobibor, Majdanek and elsewhere actually moved to the United States and changed their names;
> - *The Diary of Anne Frank* is a work of fiction;
> - the emaciated living and dead found by liberation forces died of starvation

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[246] *Ibid.* at 290.
[247] F.R. Scott, *supra* note 236 at 47.
[248] B.P. Elman, "Combatting Racist Speech: The Canadian Experience" (Aug. 1994) 32 Alta. L. Rev. 623 at 630.
[249] *Zundel*, *supra* note 17 at 38.

and typhus;
- the films and photographs are clever forgeries;
- there are no witnesses to or survivors of the slaughter and every perpetrator who later revealed his complicity was coerced.[250]

At his first trial, Zundel challenged the constitutional validity of s.181 of the *Code*. Mr. Justice Locke of the Ontario District Court held that s.181 did not violate s.2(b) of the *Charter*. Almost two months after that decision, Zundel was found guilty of one count of spreading false news. He was sentenced to fifteen months in jail to be followed by three years probation, during which he was not to publish material on the Holocaust. Zundel appealed his conviction to the Ontario Court of Appeal and his conviction was struck down for errors in the admission of evidence and the charge to the jury. However, the Court of Appeal maintained that s.181 of the *Code* did not infringe s.2(b) of the *Charter* but, if it did, the Court held that s.181 would be upheld under s.1. As a result, the Court of Appeal ordered a new trial.

On January 18, 1988 Zundel's second trial began. In his charge to the jury, Mr. Justice Thomas indicated that the elements of the offence the Crown had to prove were (1) wilful publication, (2) of a statement of fact rather than opinion, (3) which the accused knew to be false when he published it, and (4) which falsehood was likely to cause mischief to the public interest.[251] The public interest identified was racial and religious tolerance. On May 11, 1988 a second jury found Zundel guilty under s.181 of the *Code*. Two days later, Justice Thomas sentenced Zundel to nine months in jail.

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[250] *Ibid.* at 39-40.
[251] *Ibid.* at 41.

Zundel then appealed to the Ontario Court of Appeal which upheld both his conviction and sentence. He pursued a further appeal to the Supreme Court of Canada, which allowed Zundel's appeal and struck down s.181 of the *Code* as unconstitutional.

The Supreme Court split four to three on the constitutionality of s.181 of the *Code*. This time the majority judgment was written by McLachlin J.. The first issue that she addressed was whether s.181 infringed s.2(b) of the *Charter*. The Crown's principal argument on this issue was that deliberately false statements should not be accorded s.2(b) protection because they serve none of the values underlying freedom of expression. McLachlin J. held that deliberate lies may, in some cases, bolster the values underlying s.2(b). In her words:

> Exaggeration - even clear falsification - may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., "cruelty to animals is increasing and must be stopped". A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie . . . All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment.[252]

Moreover, McLachlin J. noted that, in both *Irwin Toy* and *Keegstra*, the Court held that all communication which conveyed, or attempted to convey, a meaning was protected by s.2(b), regardless of the content of the communication. The only type of

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[252] *Ibid.* at 20-21.

communication not protected by s.2(b) was that which took a violent form. Finally, McLachlin J. questioned the assumption that some statements could be determined to be false with enough accuracy to make falsity a criterion for determining constitutional protection.[253] Taking all these factors into account, she found that s.181 of the *Code* infringed s.2(b) of the *Charter*.

McLachlin J. found that the objective of s.181 could be traced to *De Scandalis Magnatum*, the purpose of which was to preserve political harmony by preventing slanders against those in power. She found that such an objective was no longer pressing and substantial in Canadian society and, therefore, s.181 could not be a valid limit of a *Charter* right or freedom under s.1. McLachlin J. also emphasized that the Court could not assign new objectives to s.181 of the *Code* to accord with a perceived current utility. Consequently, she held that it was not permissible to characterize s.181's purpose as being a concern for attacks on religious, racial or ethnic minorities as that would be to adopt a "shifting purpose" from s.181's original objective. McLachlin J. also noted the following facts to support her conclusion that s.181 did not represent a pressing and substantial objective worthy of overriding a *Charter* right or freedom: (1) the Law Reform Commission of Canada recommended the repeal of s.181, describing it as "anachronistic"; (2) unlike the hate propaganda sections of the *Code*, Canada's obligations under international human rights conventions do not require the enactment or retention of s.181 of the *Code*; (3) s.181 has been rarely used

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[253] *Ibid.* at 21.

in Canada despite its long history; and (4) no other democratic nation has a provision similar to s.181 of the *Code*.[254]

While McLachlin J.'s general approach is consistent with previous Supreme Court decisions that refuse to engage in a "shifting purpose" type of s.1 analysis,[255] her application of this approach may be faulty in some respects. As stated earlier, in 1955 the offence of spreading false news was removed from the "Sedition" section of the *Code* and re-enacted under the category of "Nuisance". The prohibition against using a "shifting purpose" analysis mandates that the Court look to the objective of the legislative provision at the time of re-enactment. Therefore, the Court should have looked to the purpose of the provision as it stood in 1955 not 1275.

The provision was re-enacted four years after the *Carrier* decision, which restricted the ambit of the offence of spreading false news because of its location in the "Sedition" section of the *Code*. It can be argued that Parliament re-enacted the offence under the "Nuisance" portion of the *Code* so that s.181 could be used to prosecute someone whose expression did not directly incite to violence or a breach of the peace. Indeed, had Parliament not re-enacted the offence of spreading false news, Zundel would have had a strong argument that his activities did not fall within the ambit of the offence. *Carrier* could have been used as authority for his position.

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[254] *Ibid.* at 28-30.

[255] See *Big M*, *supra* note 111 at 352-353 and *R.* v. *Butler* [1992] 1 S.C.R. 452 at 494-499 (S.C.C.) [hereinafter *Butler*].

However, the argument that s.181's purpose is the protection of minorities is a hard argument to make. It can be contended that, since the false news provision was re-enacted just five years after the end of World War II and the revelation of atrocities committed by the Nazis during that conflict, it is logical that s.181's purpose is the protection of minorities. However, no Parliamentary debates considered the re-enactment.[256] Therefore, such an argument is mere speculation. Moreover, it must be kept in mind that Parliament re-enacted the offence from the "Sedition" section of the *Code* to the "Nuisance" section of the *Code*. It is unclear how this shift shows a concern for minorities. Had Parliament re-enacted s.181 under the "Offences Against the Person and Reputation" section of the *Code*, where the hate propaganda provisions are contained, the argument that s.181's purpose is the protection of minorities would have been stronger. As it is, the purpose behind s.181 is unclear, and an unclear purpose cannot be "pressing and substantial" in modern Canadian society.

McLachlin J. proceeded with the s.1 analysis and assumed that the objective of s.181 was to preserve social harmony through the protection of minorities. She also assumed that there was a rational link between s.181 of the *Code* and its objectives. However, she concluded that s.181 did not pass the minimal impairment test of s.1. In her words:

> [P]erhaps the greatest danger of s.181 lies in the undefined and virtually unlimited reach of the phrase "injury or mischief to a public interest" . . . Section 181 can be used to inhibit statements which society considers should be inhibited, like those which denigrate vulnerable groups. Its

[256] *Zundel*, *supra* note 17 at 27.

> danger, however, lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. Should an activist be prevented from saying "the rain-forest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? . . . Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight? . . . These examples illustrate s.181's fatal flaw - its overbreadth.[257]

McLachlin J. also noted that s.319(2) of the *Code* had a narrow focus, as it was concerned only with statements intended to cause "hatred against any identifiable group," while the term "mischief to a public interest" in s.181 was capable of almost infinite extension.[258] In addition, in the criminal sphere the phrase "in the public interest" has been held to be unconstitutional by the Supreme Court in *R.* v. *Morales*[259] because it was vague and imprecise. Although not mentioned by McLachlin J.,

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[257] *Ibid.* at 31 and 33.

[258] *Ibid.* at 34.

[259] *R.* v. *Morales* (1992) 77 C.C.C. (3d) 91 (S.C.C.) [hereinafter *Morales*]. *Morales* is a decision of the Supreme Court in the area of judicial interim release. The criteria to be applied at a bail hearing are found in s.515(10) of the *Code*. Detention of an accused in custody can be justified on one of two grounds. The primary ground concerns the likelihood the accused, if released, will reattend in court. The secondary ground concerns the protection of the public and the public interest. Section 515(10)(b) allows for the detention of an accused if his detention is necessary for the protection or safety of the public or if his detention is necessary in the public interest. *Morales* held that the term "public interest" in s.515(10)(b) violated s.11(e) of the *Charter* because it authorized detention in terms which were vague and imprecise. (Section 11(e) of the *Charter* states: "11. Any person charged with an offence has the right . . . (e) not to be denied bail without just cause[.]") As a result, s.515(10)(b) is now read as if the impugned phrase is omitted.

Morales could be used to bolster the conclusion that the phrase the "public interest" is too broad to determine criminal consequences. As a result, on multiple grounds and at different phases in the s.1 inquiry, McLachlin J. held that s.181 did not pass constitutional muster.

The dissent in *Zundel* was delivered by Justices Cory and Iacobucci. Like the majority, they find that s.181 violated s.2(b) of the *Charter*. However, the dissent found s.181 to be a valid limit under s.1 of the *Charter*. In doing so, the dissent held that the objective of s.181 was the pressing and substantial objective of promoting the public interest in furthering racial, religious, and social tolerance.

In answering the criticism that s.181 was too vague to be a valid limit under s.1 of the *Charter*, the dissent asserted that, while it was true that the term "public interest" in s.181 was undefined, it could be defined by the courts. The dissent stated:

> The fact that the term is undefined by the legislation is of little significance. There are many phrases and words contained in the *Criminal Code* which have been interpreted by the courts. It is impossible for legislators to foresee and provide for every eventuality or to define every term that is used. Enactments must have some flexibility. Courts have in the past played a significant role in the definition of words and phrases used in the *Code* and other enactments. They should continue to do so in the future.[260]

The dissent went on to state that in the context of s.181, "public interest" should be interpreted in light of *Charter* values, particularly the equality rights and the rights preserving the multicultural heritage of Canadians.[261]

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[260] *Zundel*, *supra* note 17 at 58.
[261] *Ibid.* at 59.

The idea that a piece of legislation could be interpreted by a court in a case and later, in that same case, by using that interpretation, the legislation could be found to be valid under s.1 is not unprecedented. *Butler* provides just such an example. In that case, the Court dealt with the obscenity provisions of the *Code*, specifically s.163(8) which states:

> 163.
> . . .
> (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Thus, in order for material to be labelled "obscene," the exploitation of sex must not only be its dominant characteristic, but such exploitation must be undue. Prior to *Butler*, the courts formulated workable tests to determine when the exploitation of sex was undue. These tests were known as the "community standards test," the "degrading or dehumanizing test" and the "internal necessities test." However, the jurisprudence failed to specify the relationship of these tests to one another.[262] Consequently, in *Butler* the Court determined the relationship of these tests to each other before subjecting the section to *Charter* scrutiny. The result was that s.163(8) of the *Code* was upheld under s.1 of the *Charter*.

The difference between *Butler* and *Zundel* is that, prior to *Butler*, and in regard to obscenity, an accused had some idea of whether he/she was infringing the *Code*

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[262] *Butler*, *supra* note 255 at 483.

because of the examples of prohibited types of publications explicitly provided for in s.163(8) (e.g., a publication a dominant characteristic of which is the undue exploitation of sex and violence is prohibited). While there was some uncertainty as to what types of publications were prohibited, people had an idea of areas of risk. The same could not be said in relation to s.181.

Prior to *Zundel*, the term "public interest" in the context of the offence of spreading false news had not been defined by the courts since its re-enactment. According to its terms, s.181 could be related to any of the 224 public interests mentioned in federal legislation.[263]

While it can be argued that there is no real difference in approach between the dissent in *Zundel* and the majority in *Butler*, there is definitely a difference in degree of uncertainty regarding the offences of spreading false news and obscenity. Section 1 analyses are, in part, about which degrees of uncertainty are acceptable in legislation and which are not. Taking this aspect into account, I contend that *Butler* should be considered the advocacy of an approach that allows the Court to further interpret the ambit of an already circumscribed offence before subjecting it to *Charter* scrutiny. It should not be seen as a precedent allowing the Court to judicially limit an otherwise uncircumscribed offence, in such a way as to ensure it passes *Charter* scrutiny.[264]

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[263] H.R.S. Ryan, "Annotation to *R.* v. *Zundel*" (1992) 16 C.R. (4th) 5 at 6.

[264] The degree of precision necessary for an offence to be deemed sufficiently circumscribed to pass *Charter* scrutiny is stated in *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (S.C.C.) [hereinafter *Nova Scotia Pharmaceutical Society*]. This case dealt with vagueness and its applicability in Canadian constitutional

The foregoing examination of the Supreme Court's decision in *Zundel* has demonstrated that the majority and the dissent's analyses were flawed, but they were flawed in very different respects and degrees. Nevertheless, it is my opinion that the majority was correct in its conclusion. The offence of spreading false news as stated in s.181 of the *Code* should be held to be unconstitutional.

V. CONCLUSION

The offences of wilfully promoting hatred and spreading false news have been the subject of litigation before Canada's highest court. The former has survived constitutional challenge, while the latter has not. It has been suggested that changes in the Supreme Court's personnel since its ruling in *Keegstra* may have had some effect on its decision in *Zundel*.[265] The majority decision in *Zundel* was also viewed by many minority groups, particularly Canada's Jewish community, as a betrayal by the justice

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law. The Court held that vagueness can be raised under ss.1 and 7 of the *Charter*. Within s.1, vagueness is relevant under both the prescribed by law requirement and the minimal impairment prong of the *Oakes* test. Vagueness under s.7 and the prescribed by law requirement of s.1 are the same standard. In *Nova Scotia Pharmaceutical Society*, Gonthier J., writing for a unanimous court, stated this standard:

> [A] law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice. (*Nova Scotia Pharmaceutical Society*, *supra* note 264 at 643.)

While vagueness under the minimal impariment test of *Oakes* includes the standard under s.7 and the prescribed by law requirement of s.1, it also encompasses concerns with overbreadth.

[265] B.P. Elman, *supra* note 189 at 630. Two of the four Supreme Court Justices who voted to support the constitutional validity of s.319(2) of the *Code* retired before the Court ruled on the *Zundel* case.

system. I argue that both of these views are simplistic and erroneous. As stated by Elman:

> Although it may be argued that the *Zundel* decision was the product of a changed composition of the Court since the judgment in *Keegstra*, Justice McLachlin's use of the *Keegstra* decision (a decision in which she dissented) as a benchmark for evaluation of the false news provision, nonetheless, confirms the constitutionality of the hate propaganda provision and the validity of the analysis employed in *Keegstra* itself . . . The other salient observation arising from a comparison of the judgments is that s.319(2) was upheld because of the narrow drafting of the section . . . Thus the text of s.319(2) itself, is its most valuable feature from a constitutional perspective.[266]

Consequently, the majority's decision in *Zundel* reaffirmed the Court's commitment to the constitutionality of s.319(2) of the *Code* and of the majority's approach in *Keegstra*, despite changes in the Court's personnel.

The outcome in *Zundel* should not be viewed as evidence of a philosophical shift by Canada's highest court, but rather as a result of a poorly worded piece of legislation. In fact, it can be argued that the Court's commitment to the protection of minorities is stronger after *Zundel* than before it,[267] since there is now unanimous support in the Supreme Court for narrowly drawn criminal legislation against hate speech. It would be in this context that future constitutional challenges to the offences of advocacy of genocide and public incitement of hatred would be made. Viewed from this perspective, *Zundel* does not mark the demise of the use of criminal sanctions to

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[266] *Ibid.* at 642 and 643.

[267] The result in *Ross* supports this argument.

prohibit racist invective but rather paves the way for the continued use of criminal law against expressions of racial hatred.

CHAPTER FOUR

REFORMS

I. INTRODUCTION

In Chapter One I demonstrated racism's long legacy in Canada and revealed racial intolerance as a serious, enduring problem in modern Canadian society. As a result, there continues to be a need for hate propaganda laws. In Chapter Two I take the position that the criminal proscription of hate propaganda is justifiable from a constitutional perspective. And in Chapters Two and Three I come to the conclusion that, by and large, the criminal offences contained within the hate propaganda sections of the *Code*[268] are well drafted, in that they catch the most serious types of hate propaganda while giving great deference to freedom of expression. However, as revealed in Chapters Two and Three, there have been few prosecutions under the hate propaganda sections of the *Code*.

This chapter explains why the criminal law is not being used to combat hate propaganda and what reforms should be adopted to ameliorate this situation. These possible reforms are evaluated based on the reasoning of the Supreme Court in the *Keegstra* and *Zundel* cases. In recommending possible reforms to the criminal law in this area, law enforcement efficiency and protection of minorities are not the sole considerations. Just as the Cohen Report gave great deference to freedom of

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[268] Note that the offence of spreading false news is not contained within the hate propaganda sections of the *Code*.

expression in making the recommendations which led to the hate propaganda sections of the *Code*, the importance of freedom of expression in Canadian society is a major factor taken into account in this chapter's recommendations for reform.

II. WILFUL PROMOTION OF HATRED

A. REMOVAL OF THE "WILFULLY" REQUIREMENT

A number of possible reforms to s.319(2) of the *Code* have been suggested by various sources. Some of them strike the appropriate balance between freedom of expression and freedom from hate, while others do not.

Both the Special Parliamentary Committee on the Participation of Visible Minorities in Canadian Society[269] and the Special Committee on Racial and Religious Hatred of the Canadian Bar Association[270] recommended the removal of the "wilfully" requirement in s.319(2). This amendment would make the reckless promotion of hatred culpable.

Currently, s.319(2)'s ambit does not include speakers who are reckless as to whether hatred is promoted. It only covers situations where a speaker foresees that the promotion of hatred is certain, or substantially certain, to result from his or her actions, or when the speaker's conscious purpose is to promote hatred against an identifiable group. In contrast, human rights legislation does not usually require any intent on the

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[269] Canada, House of Commons, Special Committee on the Participation of Visible Minorities in Canadian Society, *Equality Now!* (Hull, Que.: Supply & Services Canada, 1984) at 70-71.

[270] Canadian Bar Association, Special Committee of Racial and Religious Hatred, *Hatred and the Law* (Annual Meeting, Winnipeg, Manitoba, 27 August 1984) at 13-14.

part of the speaker. Human rights legislation is solely concerned with discriminatory effects.[271] Therefore, even the inadvertent or unintentional hate propagandist can be caught by this legislation. Offences that require a *mens rea* of recklessness reside between the two extremes of requiring specific intent (the present s.319(2)) and no intent (human rights legislation). Recklessness denotes the subjective state of mind of people who foresee that their conduct may cause the prohibited result but nevertheless take a deliberate and unjustifiable risk of bringing it about.[272] The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it. Recklessness provides the general *mens rea,* which is required for most crimes where no mental element is mentioned in the definition of the crime.

Removing the "wilfully" requirement in s.319(2), and thereby making s.319(2) an offence which renders the reckless promotion of hatred culpable, would broaden the reach of the section and make convictions under s.319(2) easier to obtain. But convictions under this amended s.319(2) would still be more difficult to obtain than would findings of discrimination under human rights legislation. However, such an amendment could, in my view, lead to inappropriate prosecutions. The criminal law should focus on the hatemonger, the ardent racist who intends to stir up hatred through his or her expression. If s.319(2) were to be made an offence of recklessness, the result could be the successful prosecution of cases like *Buzzanga*, where members of a

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[271] *Taylor, supra* note 181 at 603 and B.P. Elman, *supra* note 189 at 665.
[272] *Buzzanga, supra* note 170 at 715.

minority group publish statements against their own group, not to promote hatred, but to create controversy and agitate for reforms that would enhance their community. The accused in *Buzzanga* may well have been conscious of the risk that, through the dissemination of their writings, hatred could be promoted against their group. But they proceeded anyway, hoping to create enough controversy to spur community members to agitate for reform. The accused in *Buzzanga* would then be caught by a s.319(2) which proscribes the reckless promotion of hatred. Comedians and other performing artists who, while not intending to promote hatred, use hateful terms to describe identifiable groups certainly foresee that, if interpreted incorrectly, their statements could promote hatred. Yet, they persist in this course of action in order to make their performances livelier, funnier, more realistic or profound. These artists would also be caught under a s.319(2) which proscribed the reckless promotion of hatred. Consequently, amending s.319(2) by removing the "wilfully" requirement would mean that s.319(2) would catch much speech not currently caught by the section in both the political and artistic spheres.

This amendment would then subject s.319(2) to constitutional attack on the grounds of overbreadth. The chilling effect caused by such an amendment could be substantial. It should be noted that, in *Keegstra,* Dickson C.J.C. placed particular emphasis upon the stringent intent requirement in saving s.319(2) of the *Code* under s.1 of the *Charter*.[273] Section 319(2)'s mental element was held to significantly restrict the

[273] *Keegstra, supra* note 16 at 192-194.

reach of the provision, thereby reducing the scope of the targeted expression. The word "wilfully" imports a high burden on the Crown, minimizing the impairment of freedom of expression. For these reasons, it is recommended that the word "wilfully" be retained in s.319(2) of the *Code*.[274]

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[274] It should be noted that the Court has held that human rights legislation need not have an intent requirement to be constitutionally justified under s.1 of the *Charter*. In *Taylor*, the Court held that the absence of an intent requirement in the *Canadian Human Rights Act*, S.C. 1976-1977, c.33 [hereinafter *CHRA*] did not mean it failed the minimal impairment requirement of *Oakes*. Dickson C.J.C. stated:

> The preoccupation [of human rights legislation] with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes. At the same time, however, it cannot be denied that to ignore intent in determining whether a discriminatory practice has taken place . . . increases the degree of restriction upon the constitutionally protected freedom of expression . . . Nevertheless, . . . it seems to me that the important Parliamentary objective behind . . . [human rights legislation] . . . can only be achieved by ignoring intent, and therefore the minimal impairment requirement of the *Oakes* proportionality test is not transgressed . . . The chill placed upon open expression in such a context [in the context of a human rights statute] will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim . . . Consequently, in this context the absence of intent . . . does not impinge so deleteriously upon the s.2(b) freedom of expression so as to make intolerable the . . . existence [of human rights legislation] in a free and democratic society. (*Taylor*, *supra* note 181 at 603-604.)

B. DROPPING THE PHRASE "OTHER THAN IN PRIVATE CONVERSATION" AND INSTEAD PROHIBITING THE PUBLIC PROMOTION OF HATRED

It has also been suggested that the phrase "other than in private conversation" does not protect other private communications such as a private letter to a friend. The concern is that, worded as it is, s.319(2) does not give enough protection to the privacy rights of individuals. One possible reform would be to drop the phrase "other than in private conversation" and instead prohibit the public promotion of hatred.[275] However, such an amendment is unnecessary considering the words of the Court in *Keegstra*, recounted in Chapter Two, in which Dickson C.J.C. stated that a conversation or communication intended to be private did not fall within the ambit of s.319(2) of the *Code*.[276] Consequently, a private letter to a friend would not infringe s.319(2) of the *Code* unless it was publicly circulated. This judicial interpretation of s.319(2) ensures substantial protection to the privacy rights of individuals. As a result, it is recommended that the phrase "other than in private conversation" remain part of s.319(2) of the *Code*.

C. ABOLISHMENT OF THE CONSENT OF THE ATTORNEY GENERAL

Currently, before a prosecution can commence under s.319(2) the consent of the Attorney General must be obtained. This requirement has prevented worthy prosecutions under s.319(2) from being initiated. For instance, in 1980 Alexander

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[275] Law Reform Commission of Canada, *Hate Propaganda* [Working Paper 50] (Ottawa: Supply and Services, 1986) at 35.
[276] *Keegstra*, *supra* note 16 at 192.

McQuirter, one of the Ku Klux Klan's chief organizers in Canada, was interviewed on British Columbian television and radio. Some of the statements he made during these interviews are as follows:

> We show the power of positive Christianity. We understand that God created different races and put them in different parts of the world, and we feel it's evil and unchristian to race mix them -- change the image that God created and force them together . . . Well, if the Klan was elected democratically, and we were the majority, I'd feel that a program of voluntary repatriation would be in order . . . allowing non-whites to go back to [the] land of their origin to take back any thirty to thirty-five thousand dollars per family . . . I think that in a democratic country, where the majority decides something and says listen, now we don't want you here . . . they're [non-whites] going to say -- look, okay, I realize you don't want us here; you're giving us money to go back. I think that's what I'm going to do.
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> . . .
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> These people [non-whites] breed at a fantastic rate compared with white people, and they are doing it within this country also . . . they'll work for peanuts because they're used to in their own countries living on, uh, just above the starvation level. They'll put white people out of jobs -- they'll destroy this economy by working for ridiculous wages because to them it's great, its fantastic, but to white people we couldn't even live on that[.][277]

The consent of the Attorney General of British Columbia to proceed with a prosecution of McQuirter under s.319(2) was sought and refused. In the opinion of the Assistant Deputy Attorney General, McQuirter's statements did not disclose a *prima facie* case under s.319(2) of the *Code*.[278] The Assistant Deputy Attorney General came to this

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[277] J.D. McAlpine, *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia* (As Presented to the Honourable J.H. Heinrich, Minister of Labour for the Province of British Columbia, 1981) at 4 and 23.

[278] *Ibid.* at 8.

conclusion despite startling similarities between McQuirter's statements and the material that led to the conviction of Andrews and Smith under s.319(2).

In January, 1985, Andrews and Smith, two members of the Nationalist party of Canada, a white nationalist political organization, were charged under s.319(2) of the *Code*. The accused Andrews was the Nationalist party's leader, and the accused Smith was its secretary. Both were members of the central committee, the organization responsible for the publication of the *Nationalist Reporter*, which constituted the primary subject matter of the prosecution. The ideology expressed by the *Nationalist Reporter* was summarized as follows by counsel for the accused:

> [T]he material argues that God bestowed his greatest gifts only on the 'White people'; that if it were God's plan to create one 'coffee-coloured race of "humanity" it would have been created from Genesis', and that therefore all those who urge a homogeneous 'race-mixed planet' are, in fact, working against God's will. In forwarding the opinion that members of minority groups are responsible for increases in the violent crime rate, it is said that violent crime is increasing almost in proportion to the increase of minority immigrants coming into Canada. A high proportion of violent crimes are committed by blacks. America is being 'swamped by coloureds who do not believe in democracy and harbour a hatred for the white people.' The best way to end racial strife, an exerpt opines, is by a separation of the races 'through repatriation of non-whites to their own lands where their own race is the majority . . . ' The 'Nationalist Reporter' also promulgated the thesis that Zionists had fabricated the 'Holocaust Hoax' and that because Zionists dominate financial life and resources, the nation cannot remain in good health because the 'alien community's interests' are not those of the majority of the citizens either culturally or economically.[279]

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[279] *R.* v. *Andrews* (1990), 1 C.R. (4th) 266 at 270 (S.C.C.) [hereinafter *Andrews*].

Both accused were found guilty at trial. Andrews received a sentence of twelve months incarceration, reduced to three months on appeal, and Smith was sentenced to seven months, reduced to one month on appeal.

In both *Andrews* and the incidents involving McQuirter, "race-mixing" was described as working against God's will, and the "repatriation" of non-whites to "their own lands where their own race is the majority" was advocated. While in *Andrews* the material suggested that violent crime was attributable to visible minorities, McQuirter attributed the unemployment problem to them. McQuirter should have been prosecuted under s.319(2) of the *Code*, but the refusal of the Attorney General of British Columbia to give his consent to such a prosecution prevented this from happening.

Another example of a prosecution that should have been commenced under s.319(2), but was not because the Attorney General refused to give his consent under s.319(6), is the case of Ernst Zundel. Just as Keegstra did, Zundel asserted that the Holocaust was a myth perpetuated by a powerful Jewish-Zionist conspiracy. Moreover, the pamphlet in question in *Zundel* went on to state that the greatest danger facing Britain and America was the immigration of non-Whites into these countries. It was asserted that this immigration would cause the loss of European culture and racial purity.[280] Nevertheless, Ontario's Attorney General, Roy McMurtry, refused to prosecute Zundel under s.319(2). This refusal represents the reason behind the

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[280] *Zundel, supra* note 17 at 38.

Remembrance Association's commencement of a private prosecution under the charge of spreading false news. The Attorney General then took over the prosecution but proceeded on the false news charge rather than under s.319(2). Even the prosecutor in the first Zundel trial admitted that it would have been more appropriate to proceed under s.319(2) of the *Code*.[281] Yet another example of a prosecution that should have been commenced under s.319(2), but was not because the Attorney General refused to give his consent under s.319(6), is the case of Malcolm Ross. Like Keegstra, Ross not only denied the Holocaust but also argued that Western Christian civilization was being undermined and destroyed by an international Jewish conspiracy. In regard to Ross, an inquiry was commenced under human rights legislation alone because the Attorney General of New Brunswick, Mr. James Lockyer, refused to initiate a prosecution of Ross under s.319(2) of the *Code*. To ensure that such prosecutions commence in the future, s.319(6) should be repealed so that the consent of the Attorney General is no longer required for a prosecution under s.319(2).

It may be argued that requiring the consent of the Attorney General as a condition precedent to prosecution under s.319(2) ensures that frivolous proceedings are not commenced. Those that argue that the requirement of the consent of the Attorney General should be retained contend that without it, racial, ethnic and religious groups that have animosity toward each other will initiate numerous spurious

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[281] P. Rosenthal, "The Criminality of Racial Harassment" (1989-1990) 6 Can Human R Ybook 113 at 128.

prosecutions against each other, thereby taking up valuable court time and resources. However, there is no evidence that abolishing the requirement of the consent of the Attorney General for a prosecution under s.319(2) will lead to numerous spurious private prosecutions being initiated. Even if it did, the Attorney General can always take over and stay any prosecution that is felt to be spurious, oppressive or unjustified.[282] Those falsely charged can resort to the civil remedy of malicious prosecution.[283] It is also argued that the consent of the Attorney General gives needed protection to the freedom of expression. Yet, it should be noted that in *Keegstra* the Supreme Court did not utilize the prior requirement of the Attorney General's consent for a prosecution under s.319(2) as a factor in upholding the section's constitutionality. Thus, I would recommend reforming the hate propaganda sections of the Code to allow for prosecutions under s.319(2) without requiring the prior consent of the Attorney General.

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[282] Section 579 of the *Code* gives the Attorney General or counsel instructed by him the power to take over and stay prosecutions.

[283] P. Rosenthal, *supra* note 281 at 128. The tort of malicious prosecution can be used by a person who has been wrongly prosecuted by someone else. In *Nelles* v. *Ontario* [1989] 2 S.C.R. 170 (S.C.C.) the Court held that in order to win a suit for malicious prosecution the prosecution must have been initiated by the defendant, the prosecution must have terminated in the plaintiff's favour, the criminal proceedings must have been instituted without reasonable cause and the defendant must have been malicious. It is the latter two elements which present the greatest difficulty. Not only must there have been no honest belief, based on reasonable grounds, that the accused was guilty, but there must also be proved to be an ulterior motive, other than the pursuit of justice, on the defendant's part.

This suggestion is one of the most substantial reforms to the hate propaganda sections of the *Code* that I recommend in this thesis. There have been many instances where people have expressed racial hatred since the hate propaganda sections of the *Code* were enacted and yet, to date, there have been only four reported prosecutions under them. If the criminal law is not being used to control this type of behavior, what is? The answer seems to be human rights legislation. Human rights legislation is used even where the expression at issue is extreme hate propaganda. A good example of this is found in *Aryan Nations*.[284]

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[284] Another example is found in *Taylor*. Taylor and his Western Guard Party (a white supremacist organization), had instituted a telephone message service in Toronto whereby any member of the public could dial a telephone number and listen to a pre-recorded one minute telephone message. The messages that were pre-recorded had common themes and they are summarized as follows:

> There is a conspiracy which controls and programmes Canadian society; it is difficult to find out the truth about this conspiracy because our books, our schools and our media are controlled by the conspirators. The conspirators cause unemployment and inflation; they weaken us by encouraging perversion, laziness, drug use and race mixing. They become enriched by stealing our property. They have founded communism which is responsible for many of our economic problems such as the postal strike; they continue to control communism and they use it in furtherance of the conspiracy. The conspirators are Jews. (*Taylor*, *supra* note 181 at 582.)

The extreme nature of these messages leads to the conclusion that Taylor intended to stir up hatred, yet the state's response was not criminal prosecution but the use of human rights legislation. One could argue that the human rights route is taken in these cases because criminal trials require a more exacting standard of proof than human rights inquiries. Thus, because criminal convictions are more difficult to achieve, the human rights procedures are used so as to avoid the prospect of an unsuccessful criminal prosecution lending validity to the hate messages. However, in the case of *Taylor* and *Aryan Nations* there certainly seems to be sufficient evidence for successful criminal prosecutions. Other examples where the expression at issue is extreme hate propaganda and the state's response was solely via human rights legislation, despite

In *Aryan Nations*, a Board of Inquiry was created to look into complaints concerning a cross burning ceremony and related activities in Provost, Alberta. Among those related activities, witnesses said that they saw a Swastika flag displayed in full view on a barn, and several people shouting "death to Jews" and "white power."[285] The Board made the strongest order it could under the applicable human rights legislation. This order stated that the perpetrators of the event had to refrain in the future from publicly displaying the same types of signs and symbols.[286] The Board also recommended that the Attorney General explore the possibility of initiating prosecutions under the *Code* hate propaganda provisions.[287] To date, no prosecutions have commenced.

The Attorney General may be motivated not to give his consent to a criminal prosecution under s.319(2) of the *Code* because he thinks that the less costly human rights process was utilized and, since government has acted using that process, its moral responsibility in this matter is over. If the Attorney General's consent to prosecutions under s.319(2) were not required, the human rights complainants or anyone else could lay private informations against the perpetrators of the Provost event. In my opinion, the educative effect such a prosecution would entail, coupled

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there being sufficient evidence for a criminal prosecution, include *Ross*, *Nealy* v. *Johnston* (1989), 10 C.H.R.R. D/6450, *Warren* v. *Chapman and Manitoba Human Rights Commission*, [1985] 4 W.W.R. 75 (Man. C.A.), and *McAleer* v. *Canada (Canadian Human Rights Commission)* [1996] F.C.J. No. 165 (QL).

[285] *Aryan Nations*, *supra* note 183 at 1-3.

[286] *Ibid.* at 111.

[287] *Ibid.* at 110-111.

with the extreme nature of the expression at issue, are compelling reasons for laying criminal charges. Moreover, the effect of not laying such charges means that even extreme expressions of racial hatred are sometimes met with a state response of a "slap on the wrist." The message this sends to racists is obvious, but what message does it send to target group members? One possibility is that target group members will recognize their government's willingness to take the cheapest route, even when the group is being viciously attacked.

Although it is true that, even if the requirement of the Attorney General's consent is abolished, the Attorney General can still take over and stay a prosecution under s.319(2), the negative political ramifications for taking a proactive step to stop a prosecution of an alleged hate-monger would, in my opinion, outweigh the political ramifications of the Attorney General refusing to give his consent to a prosecution. Before a Justice of the Peace can allow the laying of a private information, he/she must be satisfied that there are reasonable grounds to believe that the facts constitute an offence.[288] For the Attorney General to then stay such a prosecution, in the face of sufficient evidence to prosecute because of a hidden motivation to save money via the human rights process, the Attorney General, a politician, would be put in the position of having to explain why he/she is overriding a judicial officer as to whether a *prima facie* case is made out. If the requirement of the Attorney General's consent to a s.319(2) prosecution was abolished, Attorney Generals would be loathe to put

[288] Section 504 of the *Code*.

themselves in such an uncomfortable political position. Consequently, more prosecutions under s.319(2) would result.

D. ABOLISHMENT OF THE DEFENCES IN SECTION 319(3)

As indicated in Chapter Two, all of the defences to s.319(2) contained in s.319(3), except the defence of truth, merely serve as examples of acts that would not fall under the ambit of wilfully promoting hatred. Therefore, an argument can be made that these defences are superfluous and should be abolished. Nonetheless, there is a benefit associated with keeping these defences, and that benefit is certainty, in providing an explicit detailed delineation of the scope of the offence of wilfully promoting hatred.

The defence of truth, however, is different than the other defences in s.319(3) of the *Code*. The defence of truth operates to exculpate the accused despite the wilful promotion of hatred by him or her. The defence of truth is included in s.319(3) out of a deference to the freedom of expression. However, as stated by Dickson C.J.C. in *Keegstra*:

> The way in which I have defined the s.319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must under the *Charter*

be protected from criminal censure.[289]

Consequently, there is an argument that abolishing the defence of truth would not make s.319(2) unconstitutional.

But from a policy perspective, should the defence of truth be abolished? Discrimination and hate can be fostered even by true statements. For example, one of the racist statements in the materials produced by the accused in *Andrews* was that "Toronto's violent crime rate was increasing almost directly in proportion to the increase in immigrants from the Caribbean, India, Pakistan and blacks from the U.S."[290] This statement may well be true, but just because two things are simultaneously increasing does not mean that one causes the other. Nonetheless, such a statement would be read by many people as if it said that the immigrant groups named are responsible for the increase in violent crime, with the concomitant result of promoting hatred against these immigrant groups. In addition, providing truth as a defence to a charge under s.319(2) could provide a platform for hatemongers to expound their ideas. Thus, there are strong policy reasons for abolishing the defence of truth.

Nevertheless, there are also strong policy reaons for retaining the defence of truth as a defence to a charge under s.319(2). Many of the arguments for protecting freedom of expression, recounted in the Introduction to this thesis, have at their heart the importance of truth to society. Consequently, to exclude the defence of truth as a

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[289] *Keegstra, supra* note 16 at 198.
[290] *R.* v. *Andrews* (1988), 43 C.C.C. (3d) 193 at 197 (Ont. C.A.).

defence to s.319(2) of the *Code* would make s.319(2) even more controversial than it already is. Moreover, the common law has traditionally recognized a defence of truth to civil actions of defamation.[291] If the common law recognizes a defence of truth to civil actions for defamation, where the risk is merely in monetary terms, then certainly the argument can be made that a defence of truth should exist for criminal actions of group defamation, where the possible consequence of conviction is incarceration. "Individuals in a free society assume that, whatever restriction it may be necessary to place on free speech, they will always have the right to say what is true. That right cannot lightly be restricted."[292]

Moreover, while Dickson C.J.C.'s comments in *Keegstra* regarding the possible effects of abolishing the defence of truth are important (coming as they do from Canada's highest court), they are *obiter*. In *Lucas* v. *Saskatchewan (Minister of*

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[291] Cohen Report, *supra* note 31 at 66. The reason most often advanced in support of the defence of truth to civil actions of defamation is that "the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess." (*M'Pherson* v. *Daniels* (1829), 10 B. & C. 263 at 272, 109 E.R. 448 at 451.) The common law considered the exposure of truth as an interest paramount to that of reputation. (R.E. Brown, *The Law of Defamation in Canada*, 2d ed. (Toronto: Carswell, 1994) at 504.)

[292] *Taylor*, *supra* note 181 at 629. In *Taylor*, the Supreme Court was dealing with a human rights statute which proscribed the communication of hateful telephone messages. The statute did not contain an exemption for truthful statements. Dickson C.J.C. for the majority relied on his own reasons in *Keegstra* and held that the *Charter* does not mandate an exception for truthful statements in the context of human rights legislation.

Justice),[293] the Saskatchewan Court of Queen's Bench dealt with the constitutionality of ss.300 and 301 of the *Code* which state as follows:

> 300. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
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> 301. Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The Court began by drawing a distinction between the two sections:

> The distinction between ss.300 and 301 of the *Criminal Code* is that the Crown must prove that a person charged under s.300 knew that the published defamatory libel was false. Falsity is not a necessary element under s.301. A person may be found guilty under s.301 of publishing a defamatory libel even if that person honestly believed that the published defamatory matter was true and even if it was in fact true.[294]

The Court went on to find s.300 of the *Code* to be constitutionally justified under s.1 of the *Charter*. The fact that the Crown must prove the *mens rea* of the offence, including knowledge of falsity, was an important factor in the Court's determination that s.300 impaired freedom of expression as little as possible.[295] However, the Court held that because an accused, under s.301 of the *Code*, is open to criminal sanction if he or she expresses an opinion or belief which he or she reasonably and honestly believes to be true, and even if the defamatory libel is true, s.301 does not minimally impair s.2(b) and is not justified under s.1 of the *Charter*. The same conclusion

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[293] *Lucas* v. *Saskatchewan (Minister of Justice)* (1995), 129 Sask. R. 53 (Sask. Q.B.) [hereinafter *Lucas*].
[294] *Ibid.* at 56.
[295] *Ibid.* at 61-62. *Lucas* was affirmed on appeal, see *R.* v. *Lucas* (1996), 104 C.C.C. (3d) 550 (Sask. C.A.).

reached in *Lucas*, in regard to s.300 of the *Code*, was reached by the Manitoba Court of Appeal in *R.* v. *Stevens*.[296] In *Stevens*, Twaddle J.A. noted that:

> It is extremely doubtful that the offence of ordinary libel (*i.e.*, one published without knowledge of falsity) can be justified as a reasonable limit to the freedom of expression, restricting, as it does, the publication of truth.[297]

Lucas and *Stevens* demonstrate that truth is an important aspect influencing the constitutionality of legislation that criminalizes expression. By extrapolating from these decisions, an argument can be made that abolishing the defence of truth may make s.319(2) unconstitutional. Thus, it is recommended that the defence of truth be retained as a defence to s.319(2) of the *Code*.

E. AMENDMENT OF THE DEFINITION OF "IDENTIFIABLE GROUP"

Although the definition of "identifiable group" is a definition that applies to all three substantive offences contained in the hate propaganda sections of the *Code*, its reform is most appropriately dealt with in the context of the offence of wilfully promoting hatred. In the United Kingdom, an offence similarly worded to s.319(2) of the *Code* has been used against black activists who have made imprudent speeches against the white majority.[298] As stated by Matsuda, the harms of hate propaganda are

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[296] *R.* v. *Stevens* (1995), 96 C.C.C. (3d) 238 [hereinafter *Stevens*].

[297] *Ibid.* at 278.

[298] See for example, *R.* v. *Malik* (1968), 52 Crim. App. 140 (C.A.). Malik was one of the leaders of the Black Liberation Movement. In a speech he asserted that whites were "vicious and nasty people." He was prosecuted under s.6 of the *Race Relations Act, 1965*, ch. 73 (U.K.) under which a person is guilty of incitement to racial hatred if

> with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins:

less serious when the targeted group is a group that has not been historically discriminated against:

> Because the attack is not tied to the perpetuation of racist vertical relationships, it is not the paradigm worst example of hate propaganda. The dominant-group member hurt by conflict with the angry nationalist is more likely to have access to a safe harbour of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for members of groups not historically subjugated.[299]

Because hate propaganda directed towards a dominant group is not related to keeping that group in an inferior position, it, unlike other types of hate propaganda, should not be made the subject of criminal prohibition. As a result, it is recommended that the definition of "identifiable group" be limited to groups that suffer discrimination in Canadian society. This amendment would be in accordance with the policy behind s.15(2) of the *Charter*, which permits discrimination to ameliorate conditions of disadvantaged groups.[300]

> (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
> (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origin.

At his trial he admitted that his speech was offensive but he said that he was driven to his imprudent comments when he was recounting the discrimination suffered by blacks as a people at the hands of whites. He was found guilty under s.6 and was sentenced to twelve months in prison.

[299] M.J. Matsuda, *supra* note 11 at 39.

[300] *Andrews* v. *LSBC*, *supra* note 132 at 171 and P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1180.

III. ADVOCATING GENOCIDE

As indicated in Chapter Three, the offence of advocating genocide was adopted into the *Code*, in part to fulfill Canada's obligations under the *Genocide Convention*. Articles II, III and V of the *Genocide Convention* state:

> Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
> Article III: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.
> Article V: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.

It is apparent that the present definition of "genocide" in the *Code* does not include all the components of the definition contained in the *Genocide Convention*, but should it?

It can be argued that including the full definition in the *Code* would open s.318 to constitutional attack on the grounds of overbreadth and vagueness. For instance, the position could be taken that, by including the definition of "genocide" in Article II(d) of the *Genocide Convention* within the *Code* definition of "genocide," advocates of abortion or therapeutic sterilization might find themselves at risk of infringing the

Code.[301] This would be a legitimate concern but only if s.318 protected groups identifiable on the basis of gender, age, or mental or physical disability. However, section 318's definition of "identifiable group" is not that wide, and its scope is even further reduced pursuant to the reforms proposed in this thesis.

The Cohen Report did not advocate incorporating the phrase, "forcibly transferring children of the group to another group" into the *Code* definition of "genocide" because it was "intended to cover certain historical incidents in Europe that have little essential relevance to Canada, where mass transfers of children to another group are unknown."[302] It seems that the Cohen Committee forgot about the forcible transfer of native youths to residential schools in Canada. Although incorporating this phrase into the *Code*'s "genocide" definition would widen the ambit of the offence by adding an aspect of "cultural genocide" to the definition, it is my view that Canada's history with this type of activity compels such an amendment. Moreover, the resulting offence would still be rather narrow as other aspects of "cultural genocide" would not be caught by it. It has been argued that if the *Code*'s definition of "genocide" is expanded by the "transfer of children" amendment, supporting the practice of social welfare agencies of taking custody over native children in certain circumstances may infringe the section, as might supporting interracial or international adoptions. I argue that the amended section would not catch the advocacy of actions that are justified on

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[301] Law Reform Commission of Canada, *supra* note 275 at 28.
[302] Cohen Report, *supra* note 31 at 61.

the basis of the wellbeing of children because, to come within the ambit of the amended offence, the practice must be carried out with the purpose of destroying one of the specified groups. This specific *mens rea* requirement narrows the scope of the definition of "genocide."

The definition of "genocide" contained in Article II(b) of the *Genocide Convention* was wisely kept out of the *Code* definition of "genocide." Unlike the definitions of "genocide" contained in Articles II(a), (d), and (e) of the *Genocide Convention,* which proscribe the advocacy of relatively specific acts that cause serious bodily or mental harm to members of a group (with the intent to destroy the group), Article II(b)'s definition is more vague, general and open to interpretation. Article II(b)'s definition of "genocide" is a general category within which the more specific definitions in Articles II(a), (d), and (e) can be found (among other things). Consequently, it is my opinion that if Article II(b)'s definition of "genocide" were to be incorporated into the *Code* definition of "genocide," s.318 would be open to constitutional attack on the grounds of overbreadth and vagueness.

As a result, it is recommended that the definition of "genocide" in the *Code* be expanded to include all the acts described in Article II(a), (c), (d), and (e) of the *Genocide Convention.* Such an amendment would better fulfill Canada's obligations under the *Genocide Convention* while giving adequate protection to the freedom of expression.

However, to ensure that s.318 does not unduly infringe s.2(b) of the *Charter*, only the public advocacy of genocide should be prohibited. The reasons explaining why this amendment would be prudent are given in Chapter Three. If this amendment narrowing the ambit of s.318 is made, the protection against frivolous prosecutions ostensibly afforded by the requirement of the prior consent of the Attorney General for prosecution, would not be necessary.

IV. PUBLIC INCITEMENT OF HATRED

With regard to s.319(1) of the *Code*, the Law Reform Commission concluded that the "breach of the peace" clause was vague and should no longer be used to define the offence. Instead, the Commission recommended that the public incitement of hatred should only be criminalized when it was likely to cause harm to a person or damage to property.[303] However, it is difficult to see how the Commission's recommendations would create a less vague offence, since the words "harm to a person" and "damage to property" are susceptible to wide interpretation.[304] Instead, it is recommended that the public incitement of hatred should only be criminalized when it is likely to cause physical harm to a person or to property. Therefore, I recommend that s.319(1) be amended so that the words "to lead to a breach of the peace" are replaced by "to cause physical harm to a person or property."

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[303] Law Reform Commission of Canada, *supra* note 275 at 34.

[304] "Harm to a person" can include psychological, emotional or physical harm. "Property" is a concept which could cover everything from the tangible (eg. land) to the intangible (eg. intellectual property).

The Commission also recommended that only the intentional incitement of hatred be proscribed by s.319(1) of the *Code*.[305] They proposed the addition of the word "intentionally" before "incites" in s.319(1). It was their view that such an amendment would ensure a "heckler's veto" situation would not arise. Nevertheless, for the reasons given in Chapter Three, the present wording of s.319(1) precludes such a possibility.

V. HOLOCAUST DENIAL

Section 181 of the *Code* is examined in great detail in Chapter Three. In that chapter, the fact that the Supreme Court struck down the provision as unconstitutional is recounted and the conclusion is reached that the Court's finding was correct. Nevertheless, the question remains, is Holocaust denial proscribed under the hate propaganda sections of the *Code*?

It is true that there have been cases of successful prosecutions under s.319(2) that involved Holocaust denial. In *Keegstra* and *Andrews* the Holocaust was denied and the accused were convicted under s.319(2) of the *Code*. However, the expression in these cases went beyond Holocaust denial. Keegstra explicitly attributed evil qualities and world wide conspiracies to Jews, while Andrews and Smith attributed increases in the violent crime rate to minority groups, argued for white supremacy, and stated that Jews were responsible for the downfall of Canada's culture and economy. As a result, *Keegstra* and *Andrews* cannot be said to stand for the proposition that

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[305] Law Reform Commission of Canada, *supra* note 275 at 34-35.

Holocaust denial falls within the scope of s.319(2). *Keegstra* and *Andrews* can more accurately be described as standing for the proposition that descriptions of Jews as having evil characteristics for many reasons are caught within the ambit of s.319(2).

However, it is my view that Holocaust denial constitutes hate propaganda directed against Jews. Holocaust denial implicitly promotes hatred of Jews as they are characterized as subversive and deceiving by perpetuating the "Holocaust myth." But the implicit nature of this form of promoting hatred results in a significant risk that the specific *mens rea* required for a conviction under s.319(2) will not be able to be proven. Consequently, a criminal offence that specifically proscribes Holocaust denial would better address such expression.

But would a criminal proscription of Holocaust denial be constitutional? In *Zundel*, McLachlin J., speaking of a German offence proscribing Holocaust denial, stated that "it appeared to be a finely tailored provision to which different considerations [than those considered in relation to s.181 of the *Code*] might well apply."[306] The suggestion is that a finely tailored provision proscribing Holocaust denial may pass constitutional muster.

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[306] *Zundel, supra* note 17 at 29. The German offence proscribing Holocaust denial, of which McLachlin J. spoke, was the West German offence of insult. It was contained in articles 185 and 194 of the *German Criminal Code*. These provisions state as follows:

> Article 185 Insult. Insult shall be punished by imprisonment for a term of up to one year or by fine, and, if the insult is committed by a physical act, by a term of imprisonment of up to two years or by a fine.
> Article 194 (1) Prosecution for insult shall be instituted only upon petition. When the act is committed by disseminating or by making publicly accessible a writing (art. 11, para. 3), or in an assembly or by means of a broad-

The harm that an offence proscribing Holocaust denial would seek to prevent is a particularized and extreme version of the harm that s.319(2) seeks to prevent. As stated by the dissent in *Zundel*:

> To deliberately lie about the indescribable suffering and death inflicted upon the Jews by Hitler is the foulest of falsehoods and the essence of cruelty. Throughout their tragic history, the circulation of malicious false reports about the Jewish people has resulted in attacks, killings, pogroms and expulsions. They have indeed suffered cruelly from the publication of falsehoods concerning their culture.[307]

Both s.319(2) and an offence which proscribes Holocaust denial would aim to promote societal cohesion, but whereas s.319(2)'s object is to protect target groups, an offence

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> casting, a petition is not required, if the insulted person was persecuted as a member of a group under the National Socialist or another violent and arbitrary dominance, if the group is a part of the population and the insult is connected with such persecution. However, there can be no prosecution *ex officio* if the injured person opposes it. The opposition may not be withdrawn. If the injured person dies, the right of petition and of opposition passes to the next of kin specified in art. 77, para. 2.
> (2) If the memory of a decedent is disparaged, the next of kin specified in art. 77, para. 2, have the right to lodge a petition. If the act is committed by disseminating or by making publicly accessible a writing (art. 11, para. 3), or in an assembly or by means of a broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under the National Socialist or another violent and arbitrary dominance and the disparagement is connected with it. However, there can be no prosecution *ex officio* if the person entitled to lodge a petition opposes it. The opposition may not be withdrawn.

(As translated by Eric Stein in E. Stein, "History Against Free Speech: The New German Law Against the Auschwitz and Other Lies" (1987), 85 Mich. L. Rev. 277 at 323-324.) In *The Federal Supreme Court and the Nuremberg racial laws*, 75 BGHZ 160, 33 NJW 45 (1980) West Germany's Federal Supreme Court held that Holocaust denial constituted an insult under art. 185 and 194 of the *German Criminal Code*.

[307] *Zundel*, *supra* note 17 at 61.

proscribing Holocaust denial would focus on the protection of a specific target group, Canada's Jewish community.

The Holocaust constitutes a significant aspect of the Jewish identity. Denial of this event attacks a Jewish individual's connection with his or her culture. As stated by Dickson C.J.C. in *Keegstra*:

> Professor Joseph Magnet has dealt with some of the factors which may be used to inform the meaning of s.27, and of these I expressly adopt the principle of non-discrimination and the need to prevent attacks on the individual's connection with his or her culture, and hence upon the process of self-development.[308]

Thus, the objectives of an offence proscribing Holocaust denial are bolstered by s.27 of the *Charter*, and the relationship of Holocaust denial to one of the values underlying s.2(b) of the *Charter*, namely individual self-fulfillment, can be characterized as tenuous at best.

The search for truth also does not provide convincing support for the protection of Holocaust denial. Serious historians regard the Holocaust as an historical fact and Holocaust denial as an outrage on the truth.[309] While it is true that in *Zundel* the Supreme Court acknowledged that deliberate lies may, in some cases, bolster political participation and individual self-fulfillment,[310] the Court also held in *Keegstra* that the greater the certainty that a statement is erroneous or mendacious, the less its value in

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[308] *Keegstra*, *supra* note 16 at 180.
[309] *Zundel*, *supra* note 17 at 83.
[310] *Zundel*, *supra* note 17 at 20-21.

the quest for truth.[311] Thus, Holocaust denial is only tenuously linked to the search for truth.

Finally, it is difficult to characterize Holocaust denial as expression strongly linked to democracy. For a democracy to flourish, participation in the political process must be open to all persons. Such open participation requires that all people be treated with respect and dignity. As is the case with other types of hate propaganda directed toward Jews, expressions of Holocaust denial attack the respect and dignity that members of the Canadian Jewish community require in order to fully participate in the political sphere. Consequently, Holocaust denial is only tenuously connected to the values underlying freedom of expression and a law which proscribes such expression should be easier to justify under s.1 of the *Charter*.

Given the significance of the Holocaust to the Jewish identity, a law which proscribes Holocaust denial is intrinsically rationally connected to the objective of protecting the Canadian Jewish community. Moreover, the reasons given by the majority of the Supreme Court in *Keegstra* regarding the effectiveness of the criminalization of hate propaganda are equally applicable to an offence which focuses on a particular type of hate propaganda, such as Holocaust denial.

But would a criminal offence which specifically proscribes Holocaust denial minimally impair the s.2(b) freedom? In order to meet the minimal impairment test of *Oakes*, an offence that proscribes Holocaust denial should only proscribe the public

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[311] *Keegstra, supra* note 16 at 184.

communication of such expression. However, this added requirement would not address all the vagueness and overbreadth concerns surrounding such an offence.

For instance, when would a person be considered to be denying the Holocaust? If an individual were to say that only one million people died in the Holocaust, as opposed to six million, would that be denying the Holocaust? If a person were to agree that six million people died in the Holocaust but that there was no official Nazi German policy of extermination of Jews during World War II, is this denying the Holocaust? To respond to some of these concerns, the Holocaust should be explicitly legislatively defined using elements that are undisputed by serious historians. Such a definition would read as follows: "The Holocaust refers to the execution of millions of Jews as part of an official Nazi German policy of extermination of Jews during World War II." While the approach of singling out one historical event and criminally proscribing its denial, and its denial alone, has never been done in Canadian criminal law, it can be argued that in the case of other historical events there is no need to criminalize their denial because no one denies that these other events occurred.[312]

The final concern regarding minimal impairment and an offence proscribing Holocaust denial involves the issue of intent. Dickson C.J.C. described the specific intent required by s.319(2) as an important element in the determination that s.319(2) minimally impaired s.2(b) of the *Charter*.[313] The specific intent of s.319(2) is the intent

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[312] E. Stein, *supra* note 306 at 309-310.
[313] *Keegstra*, *supra* note 16 at 192.

to promote hatred. It is the difficulty of proving this specific intent when dealing with Holocaust denial that makes it necessary to enact a specific *Code* provision proscribing Holocaust denial. Yet, unless this new *Code* provision is an offence of specific intent there is a risk that it will be found to unjustifiably infringe the *Charter*. To address these concerns a provision which proscribes Holocaust denial should be made an offence of specific intent, but the intent required should be the intent to deny the Holocaust.

If an offence proscribing Holocaust denial were an offence of specific intent, more than just negligence or recklessness as to result would be needed to activate the offence. Thus, if someone denied the occurrence of the Holocaust but did it with a satirical intention (e.g., to show how crazy those that hold such views are), and the satirist knew there was a risk that some people may not pick up on the satire, but the satirist proceeded anyway, without a specific intent requirement in an offence proscribing simple Holocaust denial, the satirist would be subject to criminal sanction. Moreover, making an offence that proscribes Holocaust denial an offence which requires the specific intent of denying the Holocaust, as opposed to the specific intent required by s.319(2), makes it easier to obtain a criminal conviction when the expression at issue is solely that of Holocaust denial.[314] Thus, an offence that

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[314] For the reasons mentioned in relation to s.319(2) of the *Code* in Chapter Two, it is my opinion that in regard to a narrowly drafted provision proscribing Holocaust denial, there would be proportionality between the deleterious and salutary effects of the legislation.

specifically proscribes Holocaust denial and contains the characteristics I have outlined would enable the criminal law to more effectively combat this type of hate propaganda while still giving great deference to freedom of expression.

CONCLUSION

In this thesis I have argued that criminal law is an appropriate way to deal with hateful invective. However, it is not suggested that criminal legislation is the only means that should be utilized to combat expressions of racial hatred in Canada. Customs and excise provisions should be used to stop hate propaganda from entering the country, immigration policies should prevent known hatemongers from plying their trade here, and human rights legislation should be used to deal with discrimination in matters of housing, education, employment, access to public facilities, and with hateful expression in general.[315] Moreover, Canada should attempt to enter into international agreements with countries from which hate propaganda is sent to Canada via the Internet or other means, so that the obstacle of international comity is overcome and Canadian criminal prosecution of hatemongers situated abroad is made possible.

As stated by the Law Reform Commission of Canada "the role of the criminal law must be limited to preventing the most harmful hatreds aimed at clearly socially important groups."[316] Criminal legislation prohibiting the dissemination of hate propaganda must be narrowly drafted in order to protect freedom of expression. Obtaining convictions under hate propaganda provisions in the *Code* should continue to be difficult in order to convey the importance of freedom of expression in Canadian society. However, more frequent and successful prosecutions of hatemongers will send

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[315] B.P. Elman, *supra* note 189 at 665.
[316] Law Reform Commission of Canada, *supra* note 275 at 40.

the message that all members of society are valued equally and that the promotion of racial hatred is not to be tolerated.[317] Throughout this thesis I have attempted to keep these considerations in mind, and it is with these same considerations in mind that I propose the following draft bill:

1. Section 318(1) is amended to read "Every one who publicly advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."

2. Section 318(2) is amended to read as follows:
In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
(a) killing members of the group;
(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction;
(c) imposing measures intended to prevent births within the group; or
(d) forcibly transferring children of the group to another group.

3. Section 318(3) is repealed.

4. Section 318(4) is amended to read "In this section, "identifiable group" means any section of the public that is disadvantaged or subject to discrimination and is distinguished by colour, race, religion or ethnic origin."

5. Section 319(1) is amended to read as follows:
(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to cause physical harm to a person or property is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction.

6. Section 319(2.5) is enacted which reads as follows:
Every one who, by publicly communicating statements, wilfully expresses that the Holocaust did not occur is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

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[317] M.G. Somers, *supra* note 9 at 238.

(b) an offence punishable on summary conviction.

7. Section 319(4) is amended to read as follows:
Where a person is convicted of an offence under section 318 or 319, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

8. Section 319(5) is amended to read "Subsection 199(6) and (7) apply with such modifications as the circumstances require to section 318 or 319."

9. Section 319(6) is repealed.

10. Section 319(7) is amended to read as follows:
"communicating" includes communicating by telephone, broadcasting or other audible or visible means;
"Holocaust" refers to the execution of millions of Jews as part of an official Nazi German policy of extermination of Jews during World War II;
"identifiable group" has the same meaning as in section 318;
"public place" includes any place to which the public have access as of right or invitation, express or implied;
"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.

11. Section 181 is repealed.

Expressions of racial hatred may never be completely quelled. Nevertheless, the law makers and interpreters of Canada are duty bound to attempt to achieve a balance which recognizes both the importance of individual expression and the necessity of individual dignity. It is the aspiration of this thesis to serve as an aid to them in this valiant endeavor.

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